

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THUY THI VU, ET AL.,)
)
Plaintiffs,)
)
v.) NO. H-12-CV-282
) June 28, 2012
W&D APPAREL (JORDAN))
CORP., ET AL.,)
)
Defendants.)

HEARING
BEFORE THE HONORABLE LEE H. ROSENTHAL

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1 THE COURT: Good afternoon. State your appearances
2 and then please be seated. Everybody else can be seated.

3 MR. BURCK: My name is Mark Burck, B-u-r-c-k. I am
4 here as co-counsel for the Plaintiffs.

17:12 5 MS. HENRY: My name is Shea Henry, also
6 representing the Plaintiffs.

7 MS. PANJWANI: I'm Andrea Panjwani, co-counsel on
8 behalf of the Plaintiffs.

9 MR. QUAN: Gordon Quan on behalf of the Plaintiffs.

17:12 10 MS. BANG: Naomi Jiyong Bang on behalf of the
11 Plaintiffs.

12 MR. LAPIDUS: Mark Lapidus for the Plaintiffs.

13 THE COURT: All right. Thank you.

14 MS. KROPF: Sara Kropf on behalf of Aramark
17:12 15 Corporation and Aramark, Inc.

16 MR. DUFFY: Dennis Duffy on behalf of Aramark
17 Corporation and Aramark Uniform.

18 MR. DOVE: Chris Dove on behalf of Academy Sports +
19 Outdoors.

17:12 20 MS. MILITELLO: Janet Militello on behalf of
21 Academy Sports + Outdoors.

22 MR. WADE TURNER: Wade Turner, general counsel for
23 Academy Sports + Outdoors.

24 MR. ELIOT TURNER: Eliot Turner on behalf of Well
17:12 25 and David Corp.

1 MR. PECHT: Gerry Pecht on behalf of Well and David
2 Corp.

3 THE COURT: Great. Thank you.

4 A number of issues with some interesting
17:12 5 relationships to some questions pending before the Supreme
6 Court for next year that are open. I'm a little unclear how
7 we ought to proceed in light of those issues, although the
8 Defendants' position is that there are plenty of bases to
9 get rid of the case without waiting for the Supreme Court to
17:12 10 weigh in on that issue.

11 I think it may be most useful if we first talk
12 about a couple of uncertainties created by the current
13 status of the briefing, get some clarification on that and
14 then go party by party or issue by issue with a little bit
17:12 15 of overlap.

16 So, my first question is the status of the
17 RICO claims. It didn't play a large role in the Plaintiffs'
18 response to the motions to dismiss, which raises the -- and
19 the Defendants' picking up on that did not mention it, as
17:12 20 much as I could tell, in their replies to the responses.

21 So, my first question is: Are you walking away from the
22 RICO claims?

23 MR. BURCK: Yes, ma'am. The RICO claims have been
24 abandoned.

17:12 25 THE COURT: Good. That's very helpful to know.

1 So, to the extent dismissal was sought on the
2 RICO claims, that motion is granted.

3 And, again, by way of -- maybe it's
4 housekeeping; maybe it's not. The motions to dismiss the
17:12 5 earlier versions of the Complaint are moot because the
6 Second Amended Complaint is the operative pleading and the
7 current motions to dismiss directed to that complaint are
8 the ones under consideration. So, the Docket Entries 25, 26
9 and 30, the motions to dismiss directed to the earlier
17:12 10 complaints, are also moot.

11 So, the motions that are before me are Docket
12 Entries No. 49, 50, 51 and 52, all of which have been
13 responded to and replies filed, which are the motions to
14 dismiss filed by Academy. There are two of those divided
17:12 15 into -- One addresses pleadings sufficiency and the other
16 addresses -- assuming it's a sufficient pleading, it still
17 fails because these claims have no validity as a matter of
18 law.

19 At Docket Entry 51 is Well and David's motion
17:12 20 which begins with a challenge to personal jurisdiction, and
21 Docket Entry No. 52 is Aramark's motion.

22 So, just for organizational purposes, I'd like
23 to take the defense that is unique to one party and that's
24 the personal jurisdiction issue raised by Well and David.
17:13 25 Let's have argument on that and then we can go to the claims

1 that are asserted against all of the Defendants and the
2 defenses that are raised by more than one of those
3 defendants.

4 All right. Mr. Pecht, it's your motion.

17:13 5 MR. PECHT: Your Honor, Gerry Pecht here on behalf
6 of Well and David.

7 Pointing out just initially that I am here
8 only on behalf of Well and David Corp., making the initial
9 observation that they have not served W&D Apparel (Jordan)
17:13 10 Corp. To our knowledge, they have not been served.

11 This involves an F-cubed situation with regard
12 to my client, and my client is a foreign client, a Taiwanese
13 company. These claims are made by foreign plaintiffs for
14 conduct occurring in foreign countries. This raises,
17:13 15 obviously, serious issues of personal jurisdiction and
16 extraterritorial application of various statutes that are in
17 issue here.

18 So, I have got four arguments. First, there
19 is no personal jurisdiction over Well and David. Second,
17:13 20 that the ATS and the TVPRA apply -- neither of them are
21 going to apply to the extraterritorial conduct here. And I
22 don't know if you want to hear that argument at this point.

23 THE COURT: Well, tell me your take on how we ought
24 to handle the relationship to what the Supreme Court has
17:13 25 indicated it's going to take up.

1 MR. PECHT: Well, I think -- with regard to my
2 client and the specific issues with my client and the issues
3 that I am going to raise today, I don't think it's -- I
4 think the Court can go forward and decide these issues.

17:13 5 THE COURT: All right.

6 MR. PECHT: One of them, which is that the ATS
7 claims are preempted by the TVPRA -- the Court could go
8 either way on that, and I can explain that to the Court on
9 how you might want to --

17:13 10 THE COURT: When you say "the Court" are you
11 talking about "the" Court or this court?

12 MR. PECHT: This court could go either way on it,
13 because, obviously, if the ATS does not have any
14 extraterritorial application or doesn't apply to corporate
17:13 15 entities, then my client is out, because we're a corporate
16 entity and we're extraterritorial.

17 And then, finally, the Plaintiffs common-law
18 claims are barred either by limitations or failure to state
19 a claim or Rule 9, and we can go over those. The Court
17:13 20 knows well the standards for establishing personal
21 jurisdiction. We've got a 12(b)(2) motion. The issues are
22 whether there's general or specific jurisdiction. The
23 Plaintiff obviously bears the burden of proof and they have
24 to make a prima facie case that jurisdiction exists.

17:13 25 There are federal claims, and the question is

1 whether or not there are minimum contacts with any state in
2 the United States, and there are also common-law claims on
3 those issues of whether there are contacts with the state of
4 Texas.

17:13 5 First, on general jurisdiction, there is no
6 general jurisdiction over Well and David because Plaintiffs
7 have not shown that Well and David has --

8 THE COURT: I am going to stop you right there and
9 turn to the Plaintiffs.

17:13 10 Is there any basis to assert general
11 jurisdiction or is this clearly only a specific
12 jurisdictional issue?

13 MR. LAPIDUS: I am going to address both, Your
14 Honor.

17:13 15 THE COURT: So, both are on the table as far as
16 you're concerned?

17 MR. LAPIDUS: Yes, ma'am.

18 THE COURT: Okay. That was my first question. Go
19 ahead.

17:13 20 MR. PECHT: So, Well and David doesn't have
21 continuous and systematic contacts with the forum. The
22 Court is very familiar with that standard. The Fifth
23 Circuit has said it is difficult to establish general
24 jurisdiction, and the Court knows that.

17:13 25 And the defendant must have a business

1 presence in the forum, and here the Plaintiffs have not
2 alleged or presented any evidence that there's any presence
3 by Well and David Corp. in the forum. They haven't alleged
4 or represented the evidence they have an office here, that
17:13 5 they have a bank account here, that they have an address
6 here, they own any property here, that they have leased any
7 property, that they're registered to do business in the
8 state of Texas, or anywhere in the United States for that
9 matter, they pay U.S. taxes. They have not made an
17:13 10 allegation supporting a presence in either the U.S. or
11 Texas.

12 And the Supreme Court recently announced in
13 *Goodyear v. Brown*: "A court may assert general jurisdiction
14 over a foreign corporation when the affiliation with the
17:13 15 forum is so continuous and systematic as to render them
16 essentially at home in the forum." This is not a case where
17 my client is in any way, based upon the allegations or any
18 of the evidence presented, at home in the forum.

19 THE COURT: Was there any request made to you for
17:13 20 discovery that might lead to a basis for asserting facts to
21 support a general jurisdiction argument?

22 MR. PECHT: There has not been, Your Honor. No
23 request for any discovery at all. And, frankly, the theory
24 on which they're proceeding is the "stream of commerce"
17:13 25 theory, that my client, Well and David, the Taiwanese

1 company -- And, by the way, it's not the company that they
2 claim had the contract with the Vietnamese employees, and
3 it's not the company which is Well and David Apparel
4 (Jordan) and it's not the company that they claim was
5 involved and engaged in the false imprisonment. This is the
6 parent company we're talking about, the only company that I
7 am representing here today.

8 And what they allege is that company sells
9 product. They don't say that -- they don't allege or
10 present any evidence that we ship the product or that we
11 distribute the product in the United States, but we sell
12 products to U.S. companies and those products find their way
13 into the U.S. stream of commerce. And the Fifth Circuit has
14 said repeatedly in *Jackson* and *Alpine View* -- and the
15 Court's very familiar with these cases -- it's simply not
16 enough, it does not establish general jurisdiction, the fact
17 that you put a product in the stream of commerce that finds
18 its way into the United States. And that's what they have
19 alleged, that there have been sales to Aramark, there have
20 been sales to Academy as vendors and suppliers of clothing
21 to be imported to the United States. That's the allegation,
22 "to be imported into the United States."

23 They have attached four exhibits to their
24 response. These are not part of their allegations; this is
25 part of their response. They're not sworn to or

1 authenticated in any way. But those four exhibits, if the
2 Court looks at them, only go to the stream of commerce
3 issue. They only go to the fact that these products, this
4 apparel that's put into the stream of commerce, sales are
17:13 5 made overseas to U.S. companies and those products find
6 their way into the United States in the stream of commerce.

7 They have also alleged now only in the
8 response, not in the complaint, that there is travel to the
9 U.S. They cite for it these four exhibits. The Court can
17:13 10 look at those four exhibits. None of them indicate that
11 there is any travel by Well and David Corp. to the United
12 States. But, even if there was either allegation or
13 evidence of that, *Helicopteros* made it clear that purchases
14 and related trips standing alone are not sufficient for a
17:13 15 state assertion of jurisdiction because, again, it goes to
16 the point that it's not a presence in the forum. They're
17 not at home in the forum.

18 They cite to this court's decision in
19 *Construcciones*, a very different case, as the Court knows,
17:13 20 on general jurisdiction. The Washington-registered LLC in
21 that case owned and leased land in Texas. They received
22 mail at an address in Texas. They conducted business in
23 Texas through its two members, both of whom were Texas
24 residents. None of that is present here.

17:13 25 They also have argued the -- central to its

1 business argument -- This is the argument that when the
2 nature of a defendant's forum contact is essential to its
3 business that that can create jurisdiction under certain
4 circumstances. Whatever the "central to its business"
17:13 5 doctrine might mean, it does not mean putting a product into
6 the stream of commerce because the Fifth Circuit has said
7 under *Alpine* and under *Jackson* that that is simply
8 insufficient.

9 And the two cases that this court cited in
17:13 10 *Construcciones* with regard to the "stream of commerce"
11 argument both establish that a percentage of a company's
12 sales in a given state are generally irrelevant. So, the
13 fact that you put a lot of product or a large percentage of
14 your product into the stream of commerce going to the United
17:13 15 States or elsewhere does not establish -- that "stream of
16 commerce" argument is not sufficient to establish general
17 jurisdiction.

18 I point out that in their pleadings at one
19 point they say that we have \$57 million worth of business in
17:13 20 the United States. If you look at the exhibit that they
21 actually cite to, it's \$57 million in the United States and
22 Europe. So, that's -- I wanted to point that out.

23 That's general jurisdiction. There is no
24 specific jurisdiction over Well and David to show --

17:13 25 THE COURT: Mr. Pecht, let me back up for a minute.

1 What if it just said the exhibit was consistent with their
2 description of the exhibit? That is, it said 57 million
3 dollars' worth of business in the United States, putting
4 aside the time period over which that was generated? Would
17:13 5 that make a difference?

6 MR. PECHT: Not a difference at all. The amount of
7 business that you do in the United States -- the amount of
8 sales into commerce that come into the United States makes
9 no difference whatsoever because the Fifth Circuit has said
17:13 10 that the "stream of commerce" argument is simply
11 insufficient to establish a presence -- the question is,
12 really, are you present in the state, in the country -- and
13 it does not constitute a presence in the state or country.

14 So, for specific jurisdiction, the Plaintiff
17:13 15 needs to show that her cause of action arises out of or
16 results from the Defendant's forum-related context.
17 Specific jurisdiction is claim-specific. So, you look at
18 each claim specifically and you ask the question does that
19 claim arise out of or result from the Defendant's forum-
17:13 20 related context.

21 Here none of the cause of actions relate to or
22 arise out of the contact with the United States or Texas.
23 The issues, the claims, all arise out of facts involving
24 Vietnamese individuals, employment contracts with a
17:13 25 Jordanian company, activities in a factory in Jordan, and

1 they do not relate to the transmission of products to the
2 United States.

3 And it would be different if this was a case
4 where you had like a defective product that was manufactured
17:13 5 overseas, shipped to the United States, the product was
6 defective here and the cause of action arose out of that
7 defective product being in the United States in commerce.

8 None of these causes of action arise out of
9 anything that happened in the United States. The apparels
17:13 10 that came to the United States has nothing to do with the
11 cause of action. It's too attenuated with that cause of
12 action that occurred overseas in a foreign country among
13 foreign parties.

14 THE COURT: So, is your motion that it -- to the
17:13 15 extent specific jurisdiction turns on a kind of "but for"
16 argument -- that is, but for the contractual opportunity to
17 sell in the United States this never would have happened --
18 that that's simply insufficient?

19 MR. PECHT: It doesn't work here.

17:13 20 THE COURT: All right.

21 MR. PECHT: With regard to the TVPRA, it does not
22 apply extraterritorial to my client -- extraterritorially to
23 my client. The Court, I know, is familiar with *Morrison*
24 which is an F-cubed case, foreign shareholder suing foreign
17:13 25 companies with regard to shares that were traded on a

1 foreign exchange. The Supreme Court said, when the statute
2 gives no clear indication of an extraterritorial
3 application, it has none; and, even when the statute
4 provides for some extraterritorial application, the
17:13 5 presumption against extraterritoriality operates -- limits a
6 provision to its terms.

7 The TVPRA has a provision, Section 5096, which
8 provides for extraterritorial jurisdiction "only for
9 criminal violations and only if the offender is either a
17:13 10 U.S. citizen" -- I'm sorry -- "a U.S. national or a lawful
11 permanent resident" -- we are not, and they concede we are
12 not -- "or the offender is present in the United States."
13 Well and David Corporation is not present in the United
14 States.

17:13 15 So, the restrictions under the statute -- even
16 if a criminal component applied to the civil side of this,
17 the restrictions are such that my client doesn't fall within
18 it. The statute simply does not apply extra-
19 extraterritorially to my client.

17:13 20 Judge Ellison did conclude that Section 5096
21 applied extraterritorially in *Adhikari v. Daoud*, but he did
22 not have the benefit of *Morrison* and the defendant -- and
23 then the movant in that case was KBR, and they're located
24 right downtown. They're a very different situation than
17:13 25 what I have here, which is I am representing a client that's

1 based in Taiwan.

2 With regard to the argument that you can't
3 take claims that are barred by the TVPRA and then reclassify
4 them as ATS claims, that's the one issue -- you know, the
17:13 5 Court could decide it now. The Court could wait for *Kiobel*
6 on that issue, but the argument is very simple that Congress
7 has created an express cause of action for the Law of
8 Nations violations, the claims they're asserting here. That
9 cause of action is under the TVPRA. They have restricted
17:13 10 extraterritorial application to that particular cause of
11 action and the Plaintiffs cannot try to circumvent that by
12 creating a federal tort, common-law tort, under the ATS that
13 doesn't have that restriction on the extraterritorial
14 application.

17:13 15 And then we rely on the Seventh Circuit's
16 decision in *Enahoro*, which dealt with the TVPA, a very
17 similar statute, in which the court there said it is hard to
18 imagine that the Supreme Court's decision in *Sosa* would --
19 that that court would approve of common-law claims based on
17:13 20 torture and extraterritorial killing when Congress has
21 expressly provided a cause of action for those violations.
22 So, we think that's what this court should follow as well.

23 Finally, with regard to the state law claims,
24 they're barred by limitations. They're barred because there
17:13 25 is no claim on which relief can be granted and they're

1 barred also by 9(b). The limitations for negligence,
2 conspiracy and false imprisonment is two years. These
3 events occurred in March of 2008. The lawsuit was brought
4 in January of 2012. They claim that there is equitable
17:13 5 tolling that should be applied.

6 Equitable tolling is not applicable here for a
7 number of reasons, but, factually, what we have here is
8 Ms. Vu was in Bangkok in March of 2008 and had been in
9 contact with Dr. Nguyen Thang, who was on the board of Boat
17:13 10 People SOS at that time, in March of 2008.

11 And in her congressional testimony, which this
12 court can take judicial notice of, Vu said that while she
13 was in Thailand Boat People SOS assisted her in her daily
14 life and with "legal aid for my refugee status application."
17:13 15 So, she had access to legal aid. She had access to Nguyen
16 Thang. She understood what the issues were because she has
17 testified that she understood what the issues were. And she
18 had two years under the very generous statute of limitations
19 to bring these claims if she wanted to bring them, and there
17:13 20 was nothing barring her or preventing her from doing that.

21 If you look at Exhibit 7 to their response to
22 our motion, it shows that Plaintiffs knew all the facts
23 necessary to bring her claims and that Vu's congressional
24 testimony shows that she could have done so by March --
17:13 25 within two years after March of 2008.

1 The breach of contract claim against my client
2 fails because they say in paragraph 109 that the contract
3 was between W&D Apparel (Jordan) and the Plaintiffs, not my
4 clients. You can't have a breach of contract claim for a
17:13 5 party that is not a party -- against a party that's not a
6 party to the contract.

7 And with regard to their fraud claim, basic
8 principles of 9(b), the Court knows well it provides that
9 they have to tell us the who, what, when, where, why of the
17:13 10 statements that they claim were fraudulent and they haven't
11 done any of that.

12 So, unless the Court has any questions, that's
13 all I have got.

14 THE COURT: All right. Let me hear the response to
17:13 15 your arguments.

16 MR. LAPIDUS: May I reply, Your Honor?

17 THE COURT: Yes, please.

18 MR. LAPIDUS: Judge, my name is Mark Lapidus. I
19 represent the Plaintiffs in the case. I am going to address
17:13 20 the issue relating to jurisdiction for Well and David.

21 I will say that it's my understanding that
22 they are attempting to serve W&D in Jordan, that it's a part
23 of -- it's been filed and it's a part of the government
24 process and W&D is -- we're in the process of getting them
17:13 25 served. It's not that we're not trying. It's just that it

1 hasn't gone through the system yet.

2 Your Honor, I think that there is sufficient
3 reason for you to leave the case on the docket for
4 jurisdictional purposes for both specific and general.

17:13 5 First of all, we agreed with the Defendants
6 that we would hold this hearing before any discovery was
7 done even before the Rule 26 disclosures were done. The
8 Rule 26 disclosures would require them to designate persons
9 with knowledge of relevant facts. They would require them
17:13 10 to disclose or even provide copies of documents that are
11 relevant.

12 Let me talk about some of the things that we
13 do not have, Judge. If you read the pleadings and you read
14 the complaint that was filed, the Vietnamese residents were
17:13 15 taken to a different country and they were forced to sign a
16 contract without reading it and they signed it by placing
17 their thumbprint on it. We don't have a copy of that
18 contract. We're certainly entitled to have it to see who
19 the contract was with and what the terms of the contract
17:13 20 said.

21 Similarly, Your Honor, we do not have a copy
22 of the contract between Well and David or W&D and --

23 THE COURT: Let me back up. Does Well and David
24 have a copy of those contracts?

17:13 25 MR. PECHT: Well and David Corp., I don't know,

1 Your Honor. I don't know.

2 MR. LAPIDUS: And that's my point, Judge, is that
3 we need to see some of those to find out who we might have
4 cases against and, frankly, because we dismissed the RICO
17:13 5 claims, who we don't have cases against.

6 THE COURT: There is no indication in what you have
7 alleged in the description given of the contract that Well
8 and David would have been a party to those contracts, but --

9 MR. LAPIDUS: I'm sorry, Judge. I didn't --

17:13 10 THE COURT: No. I understand your point.

11 MR. LAPIDUS: In addition to that, Your Honor, as
12 far as both specific and general go, we don't have a copy of
13 the contract between either Well and David or W&D and
14 Aramark or Well and David, W&D and Academy. As you know, I
17:13 15 mean, these multinational corporation contracts have
16 provisions about whose law applies and where the law should
17 be applied, what venue should exist. Is there an indemnity
18 provision that Academy or Aramark has with W&D or Well and
19 David that says 'If you are accused of violating
17:13 20 international norms or statutes and we get sued because of
21 it you will agree to indemnify us for it'? Certainly,
22 that's evidence that shows they agreed to be haled into the
23 state of Texas like --

24 THE COURT: Do you have a case that says -- Is
17:13 25 there a case that says that that's sufficient for personal

1 jurisdiction?

2 MR. LAPIDUS: I don't think, Judge, there is a case
3 that says that that, standing alone, is sufficient, but
4 that's not what the cases talk about. The cases talk about
17:13 5 selective contacts --

6 THE COURT: Do you have a case that relies on that
7 factor?

8 MR. LAPIDUS: I do not, Judge. I do not. But,
9 again, it's just one provision, it's one thing that we don't
17:13 10 have that we certainly are entitled to through discovery
11 that shows the relationship between the parties. What
12 control did Academy have over W&D or Well and David? What
13 did Aramark have? What control did they have? What did the
14 contractual provisions discuss and address concerning those
17:13 15 rights and those obligations?

16 THE COURT: And how would that pertain to
17 jurisdiction over Well and David?

18 MR. LAPIDUS: Again, Judge, if there's provisions
19 within those contracts that talk about whose law should
17:13 20 apply if there is a dispute. If Well and David doesn't
21 perform according to the contract, what rights does Academy
22 or Aramark have to bring them to Texas or bring them to the
23 United States to file suit against them for those? If Well
24 and David violates international norms or violates standards
17:13 25 and it's part of the contract and they get sued for it....

1 Again, Judge, it's just a factor I think that we should be
2 entitled to discover.

3 THE COURT: In your agreement on holding off on
4 discovery -- Most of the challenges to the pleadings are
17:13 5 challenges in which discovery would obviously be premature.
6 The unrecognized claim arguments are a perfect example of
7 that. But I guess, since this is a 12(b)(2) motion, I am a
8 little confused or unclear as to why there would have been
9 no discussion at all about any discovery that might be
17:13 10 appropriate or whether there was a -- it was premature to
11 have argument on a personal jurisdiction challenge when
12 there was an agreement not to have any discovery at all
13 relating to the facts that are relevant to that issue, both
14 specific and general jurisdiction.

17:13 15 So, I guess I am confused as to why the whole
16 discovery issue for a 12(b)(2) motion was treated in the
17 same way as discovery for a 12(b)(6) set of issues.

18 MR. LAPIDUS: Judge, in hindsight, do I wish that
19 we would have put it in a Rule 11 agreement or not -- we're
17:13 20 not in state court -- but if we would have specifically
21 addressed and discussed that? Sure, it would be nice to
22 have a letter back and forth between us. But I think the
23 case law says -- the Fifth Circuit case law says that when
24 we're not conducting an evidentiary hearing our
17:13 25 uncontroverted allegations have to be taken as true, as well

1 as the information that's in our affidavits and supporting
2 documentation. The only documentation we were able to get
3 was documentation we had obtained from the Internet from
4 either their vendors or their suppliers and information like
5 that.

6 So, we're just asking some deference from the
7 Court to allow us to be able to do discovery on, for
8 instance, "minimum contact" issues.

9 THE COURT: Was there a specific request made in
10 your briefing on the jurisdiction issues that asked for a
11 deferral of the ruling pending an opportunity to conduct
12 discovery?

13 MR. LAPIDUS: No, Judge, there's not.

14 THE COURT: Okay.

15 MR. LAPIDUS: If we were permitted to obtain
16 discovery from them, again, we could see these contracts.
17 The *Helicopteros* case talks about where was the contract
18 executed and what does the contract say about choice of law
19 provisions and whether Peruvian law should apply and things
20 like that. Certainly, we should be entitled to see that.
21 What residents of the state signed the information?

22 We have provided documentation to the Court
23 that -- and I want to be specific here with my numbers --
24 that more than 300 shipments were made by Well and David or
25 W&D to the United States from their countries over a

1 four-year time period. And at 52 weeks a year for four
2 years, that's -- I mean, that's less than 200 weeks. And if
3 they're shipping more than 350 times, Judge, during that
4 time period, they're shipping more than once a week.

17:13 5 And the documentation we provided to you, Your
6 Honor, talks about states that they ship to, and Texas is
7 blacked out as one of the states that they ship to.

8 Again, we're entitled to discovery on this
9 information, on the number of times they ship to Texas. Did
17:13 10 they send people here to Texas to negotiate the contract?
11 Did they sign the contract while they were sitting here in
12 Houston, Texas? We're entitled to discovery on those kinds
13 of things, specifically on the "minimum contacts" argument
14 that they're making.

17:13 15 THE COURT: But you nowhere in your brief mention
16 this.

17 MR. LAPIDUS: No, Judge, it's not mentioned because
18 our facts have to be taken as true, and the documentation
19 that we have provided to the Court and the supporting
17:13 20 documentation shows that information.

21 THE COURT: So, your argument is that the record I
22 have is sufficient for me to rule on the motion? That's
23 what you argued in your brief.

24 MR. LAPIDUS: I think so, Judge. And, if not, I am
17:13 25 asking on behalf of my clients that we be permitted to do

1 discovery, even if on the limited issue of the "minimum
2 contacts" and the "specific jurisdiction" argument.

3 The "specific jurisdiction" argument goes to
4 they entered into these contracts -- Academy and Aramark.
17:13 5 They knew that Well and David -- they had these contracts
6 with Well and David to make product for them that came into
7 this country. And if through the use and implementation of
8 that contract they are engaging in human trafficking, that
9 is sufficiently tied to provide specific jurisdiction as
17:13 10 opposed to just general jurisdiction because it relates to
11 and is employed by the contract itself.

12 And, again, we don't have that contract. We
13 haven't been able to see it. So, I think we should be
14 afforded the opportunity to do so.

17:13 15 And, Judge, I think it's important to know
16 which contracts came first. Did Aramark and Academy
17 negotiate these contracts with Well and David and W&D and
18 then W&D or Well and David go and get these guys from
19 Vietnam, these workers from Vietnam, and bring them to
17:13 20 Jordan to work or was it vice versa? I mean, I think that's
21 very important on, certainly, knowledge of what was going on
22 and knowledge that could be imputed to Well and David or
23 W&D.

24 So, this is, again, the type of information,
17:13 25 Your Honor, that I think you should allow us the opportunity

1 to discover and find.

2 The only -- I have reviewed the cases that
3 they cited, Judge, and of those cases there was only one
4 that did not permit discovery. Every other court in every
17:13 5 other case that was decided there was deposition testimony,
6 there were documents.

7 In the *Alpine v. Atlas* case from the Fifth
8 Circuit -- it was decided out of here --

9 THE COURT: I suspect they asked for the discovery.

17:13 10 MR. LAPIDUS: They may have, Judge, but they were
11 further along in the process as well when the motions were
12 filed, and they were further along in the process and all of
13 that information had been discovered and exchanged. In
14 fact, one of the cases had been remanded back to state court
17:13 15 and there was discovery done in that instance.

16 It's too premature. We need to be afforded
17 the opportunity to see this information.

18 THE COURT: All right.

19 MR. LAPIDUS: I'm sorry, Judge. It was 370
17:13 20 shipments between July, 2007, and May, 2012. The
21 documentation we provided to the Court shows that they have
22 partners -- their words, not our words -- with 27 U.S.
23 companies. Where are these U.S. companies? How often are
24 they making shipments to these U.S. companies? What are the
17:13 25 contracts with these U.S. companies and what do they say

1 about whether they have agreed to be sued in the United
2 States? Some of the documentation, Judge, even shows
3 shipments to Katy, Texas, for Academy.

4 That, I think, addresses the arguments that we
17:13 5 have for general and specific.

6 As far as the state law claims go, Judge, I
7 wish I had an argument on the two-year statute of
8 limitations. I don't have much of an equitable tolling
9 argument on that one. I think in some of the other cases
17:13 10 the Plaintiffs were prohibited from filing their lawsuits.
11 In this particular case, Judge, we haven't been able to have
12 contact and sit down and go over details with all of them
13 about whether they would have been precluded, but, as far as
14 Ms. Vu is concerned, I can't sit here and tell you with a
17:13 15 straight face that she didn't have that information.

16 Now, there's a four-year statute of
17 limitations on fraud. We have made our allegations. We
18 have set forth the conduct that we believe was committed,
19 the false representations that were made and reliance.
17:13 20 Fraud is a four-year statute of limitations and I think,
21 Judge, technically, that one should stay and at least we
22 should be able to do some discovery on what they knew, the
23 information that they knew, the representations that were
24 made, who they were made by and information like that.

17:13 25 THE COURT: All right. I have your argument. I

1 think I have to grant the motion to dismiss with respect to
2 the statute of limitation arguments raised on the two-year
3 claims.

4 MR. LAPIDUS: And I think that's right, Judge, but
17:13 5 there's only Well and David on those.

6 THE COURT: I understand.

7 MR. LAPIDUS: Thank you, Your Honor.

8 THE COURT: All right. Thank you.

9 Mr. Pecht, do you want to make any reply
17:13 10 argument, particularly on the issue of discovery?

11 I'm sorry. Did you have something you wanted
12 to add?

13 MS. HENRY: Your Honor, Mr. Pecht brought up
14 initially the extraterritorial application of the TVPRA and
17:13 15 the ATS. I will be addressing that issue on behalf of the
16 Plaintiffs.

17 THE COURT: That's fine. I think we're just
18 talking about jurisdiction right now. Thank you.

19 MR. PECHT: The discovery that he is asking for
17:13 20 isn't going to do him any good. The courts -- and the case,
21 Judge, that really touches this is the *Freudensprung v.*
22 *Offshore Technical Services, Inc.* It is a Fifth Circuit
23 case. It involved a Willbros entity that was located in
24 Nigeria and it involved a Texas company called OTSI that was
17:13 25 located here in Texas, and the question was whether or not

17:13 1 there was personal jurisdiction over the Willbros Nigerian
2 entity. And the plaintiff said, well, Willbros Nigeria had
3 a contract with OTSI, a Texas company, and that contract was
4 relevant to jurisdiction. The court said, no, that's not
5 sufficient.

6 And then they said that that contract
7 contained an arbitration provision for arbitration in Texas.
8 And what the court said was that doesn't make any
9 difference, these contracts don't make any difference,
17:13 10 because, they said, even if WWAI, which is the Willbros
11 entity, may have expected to arbitrate disputes between
12 itself and OTSI in Texas, it does not concomitantly follow
13 that the Willbros entity reasonably anticipated being haled
14 into a Texas court to defend a lawsuit brought by
17:13 15 Freudensprung.

16 THE COURT: Would the issues be different if there
17 had been a request for discovery or if there had not been
18 this stipulation or if there had been a reference in the
19 brief to a need for additional information?

17:13 20 MR. PECHT: Well, they made an election, Your
21 Honor. They could have gone one of two ways. They could
22 have stood on their pleadings and taken the benefit of the
23 prima facie case argument or they could have asked for an
24 evidentiary hearing and done discovery.

17:13 25 What they did have is they made their election

1 and said, 'We take our allegations as true. We've
2 established a prima facie case and we briefed it on that,'
3 and, having made the election, they should be held to what
4 they elected to do, but they should not be allowed to have
17:13 5 their cake and eat it.

6 And, so, they elected to go this route and
7 this is the route we have all gone down, and they have
8 elected not to get engaged in discovery and, having done it,
9 they should be bound by it.

17:13 10 And, so, the documents that they're asking for
11 this discovery, it's not going to get them what they want,
12 because the Fifth Circuit has said that there is no contract
13 that they should claim that says that any disputes between
14 the Plaintiffs and Well and David are to be decided in
17:13 15 Texas. They don't argue that. They're arguing other
16 contracts between other parties; and *Freudensprung* says
17 that's not sufficient, that doesn't give you jurisdiction.

18 And all of the documentation in the world
19 about Well and David importing or selling product in the
17:13 20 Middle East or in China that is then purchased by U.S.
21 companies over there and shipped to the United States and
22 sold by those U.S. companies in the United States is not
23 going to get them jurisdiction in the United States. And
24 they can never overcome the "specific jurisdiction" issues
17:13 25 which there is no causal relationship, no "but for"

1 causation between their cause of action and the contact of
2 the United States.

3 So, what he is asking for, really -- He's, in
4 effect, made an election and needs to be held to it and he
17:13 5 has not asked for discovery; and the discovery, even if he
6 had it, wouldn't help him.

7 With regard to no equitable tolling, he's
8 conceded that -- I think the Court has heard that.

9 On the fraud claim, the Court cannot look at
17:13 10 this complaint and find in it anywhere what
11 representations -- the fraudulent statements my client
12 purportedly made. It's not in there. It's not broken up by
13 my -- You can't see 'Well and David said this and made this
14 representation and misled this plaintiff on this date and
17:13 15 this time.' It's not in there. And 9(b) is meant to be a
16 gatekeeper, a gatekeeper on proceeding in fraud claims, and
17 they haven't satisfied the initial gate --

18 THE COURT: So, your real problem is that it's
19 globally plead?

17:13 20 MR. PECHT: It's globally pled and that is simply
21 insufficient.

22 Thank you, Your Honor.

23 THE COURT: All right. Thank you.

24 Anything further on the jurisdiction issues?

17:13 25 MR. LAPIDUS: No, Your Honor.

1 THE COURT: All right. Thank you.

2 Let's take up the wealth of other issues in
3 the case, and here I am a little less clear about what makes
4 the most sense about proceeding, but perhaps if we could
17:13 5 take up the whole set of issues relating to the ability to
6 a) make a direct versus an indirect case against the
7 Defendants under the various statutes that have been
8 pleaded. The whole question of whether entering into a
9 contract with a supplier who then engages in the conduct
17:13 10 that is alleged could expose the American contracting party
11 to statutory liability on any of these joint employer,
12 quasi-independent agent, principal agent kinds of theories.
13 That cuts across a number of the different parties here.

14 MR. DOVE: Yes, Your Honor. My name is Chris Dove.
17:13 15 I represent Aramark Academy Sports + Outdoors.

16 And by the most wonderful coincidence, in my
17 discussion with Miss Kropf who represents Aramark, we had
18 thought that the best way to organize our arguments would be
19 for me to handle the issue you have just described from a
17:13 20 factual standpoint and for Miss Kropf to handle the specific
21 causes of action, the claims that have been brought here
22 today.

23 THE COURT: That's fine.

24 MR. DOVE: I would like to begin by pointing out
17:13 25 what I think is the most remarkable thing about the

1 Plaintiffs' case: that it's factual allegations are
2 extremely narrow, but its implications are very broad. This
3 case is much narrower than the other forced labor cases this
4 court will find, if you do all the same reading that I have
17:13 5 done -- and, if you will, I feel very sorry for you.

6 This case alleges that there was fraud in
7 Vietnam, that this caused workers to come to Jordan, where
8 they found that the pay and the conditions were not what had
9 been promised. They then went on strike. They were
17:13 10 punished severely for this, at the end of which, six weeks
11 later, they were returned to Vietnam, and that ends the
12 allegations.

13 What is so significant about this to me is
14 they're not alleging that forced labor was the ordinary
17:13 15 course of action. They're claiming it was a reaction to a
16 one-time labor strike.

17 They are not alleging that forced labor was an
18 ongoing cause of action. It is a reference to an event that
19 took six weeks in February and March, 2008.

17:13 20 And, most importantly, none of these
21 allegations tie Academy or Aramark to that one-time,
22 six-week-long labor strike. They don't allege that we lied,
23 that we were the ones shorting their paycheck, that we were
24 the ones who beat them or locked them in the factory or that
17:13 25 even we were the ones who paid for their return. We don't

1 appear anywhere in those allegations.

2 Any theory that they have against us must
3 necessarily be of a secondary or derivative nature. They
4 reach for some way to try to blame companies that have
17:13 5 nothing to do with their direct allegations. They tried to
6 claim agency. They tried to claim joint employment. They
7 also tried to make a case under the TVPRA provision where,
8 if you are a knowing participant in a venture that you
9 should have known involved forced labor, you can be liable.
17:13 10 All of these require an extraordinary level of control over
11 the workers or would require a significant level of
12 knowledge and involvement in a venture, in something that we
13 would be participating in, that involved forced labor.

14 How do they try to bridge that gap? In their
17:13 15 first complaint they did not attempt to do so. So, they
16 went back and they revised their complaint, and all they
17 came up with at that time was Academy and Aramark's codes of
18 conduct in which we say, firmly, we will not tolerate forced
19 labor and human trafficking. This, they claim, is evidence
17:13 20 of forced labor and human trafficking.

21 When we pointed this out to the Court in our
22 motion, their response for the first time encompassed a
23 wealth of new materials never previously referenced in,
24 actually, a complaint where they try to reach for other
17:13 25 things. They claim, 'Well, you have third-party auditors

1 that perform inspections of these facilities and, surely,
2 that means you have taken on the duty to prevent all forced
3 labor. They point to the fact that our purchase orders are
4 very detailed, that sometimes we require that the goods be
17:13 5 produced in a way where we can take them straight out of the
6 container, put them out on the showroom floor so that people
7 can buy them without any additional work. And they point to
8 the fact that U.S. Customs requires the manufacturer to keep
9 certain paperwork.

17:13 10 All of these things, all of them, are the
11 ordinary actions of retail importers. That's why these
12 allegations are so significant and are so dangerous.

13 Did Academy really open itself up to an
14 expensive discovery process and an expensive lawsuit by
17:13 15 firmly declaring it was opposed to forced labor? Should we
16 have remained silent? Would that have been better? Did we
17 expose ourselves to an expensive discovery process by
18 running a retail operation, by asking our vendors to follow
19 Customs regulations? Does that mean we cannot get out of a
17:13 20 case on Rule 12(b)(6) ever again in the future?

21 THE COURT: If we were to put aside for the moment
22 the question of whether it's appropriate even to look at the
23 additional materials, given the sequence and the procedural
24 posture in which they were presented -- I have heard similar
17:13 25 arguments raised in the context of trying to assert that a

1 premises owner is liable for the acts of subcontractors
2 committed on or off the premises injuring third parties or
3 various people's employees because the premises owners
4 routinely subject their subcontractors or independent
17:13 5 contractors working on the premises to detailed safety
6 codes, require adherence to them, require them to follow
7 certain paperwork, require them to hold different kinds of
8 meetings with their employees, subject their employees to
9 different kinds of drugs and other tests. Is that a -- And
17:13 10 the courts say that's not enough to make the independent
11 contractor an agent or the principal of, depending on which
12 end we're looking at, the premises owner not enough to make
13 a joint employer status, things like that. Is that an
14 analogy to what you're arguing here?

17:13 15 MR. DOVE: I think it's an excellent analogy. It
16 had not occurred to me because the facts are actually
17 stronger in that analogy --

18 THE COURT: Sure.

19 MR. DOVE: -- for the exercise of liability,
17:13 20 because the main difference I would draw is that this is not
21 Academy inviting a group of Vietnamese workers into its
22 stores to work there. This is Academy purchasing goods made
23 at a vendor that is kept at arm's length.

24 And the only allegations that would try to
17:13 25 draw Academy or Aramark into this case are precisely the

1 kinds of allegations that could be made against any
2 importer, any retailer anywhere in the world, which is why,
3 if there were two cases I would draw the Court's attention
4 to, in addition to your familiarity with these premises
17:13 5 liability cases, they would be *Doe v. Wal-Mart* and the
6 *Indian Harbor* case.

7 In both cases, to overly simply the courts'
8 reasoning, they say, if all you're alleging is the ordinary
9 activity of a business, you have not pleaded that kind of
17:13 10 heightened activity, that heightened knowledge or means and
11 power to control that would make you liable in both
12 circumstances. We think that's the right analysis here.
13 Otherwise, we're somewhat flummoxed as to how to proceed.
14 We thought we were being good guys here.

17:13 15 And I think that would be the end of my
16 comments and I would yield to Miss Kropf, unless the Court
17 has any more questions.

18 THE COURT: Is there any case that has adopted the
19 theory that the Plaintiffs have asserted that you're aware
17:13 20 of?

21 MR. DOVE: Not one.

22 THE COURT: Is there any case that has rejected the
23 theory?

24 MR. DOVE: Let me give a roundabout answer by
17:13 25 saying "No" and then let me tell you -- When I read their

1 response I called in employment lawyers and other lawyers to
2 read it because I thought 'I don't see how this can possibly
3 be the case.' The employment lawyers read the response and
4 said, 'That's not joint employment. I have never heard of
17:13 5 it being applied like this.' They went off and researched
6 and said, 'I can't swear to you that it's never been done
7 before, but I sure have searched Westlaw and found nothing.'
8 I didn't believe it. I looked, too. I didn't find
9 anything. The claim is so extraordinary. It had never been
17:13 10 raised in this context before, that, if it exists, it's
11 mind-boggling.

12 THE COURT: The closest analogy that I am
13 personally aware of is the one I described -- that is, when
14 you get these cases involving the people who are styled as
17:13 15 independent contractors or working for independent
16 contractors but are required to follow the premises owner's
17 safety codes, reporting requirements, things like that,
18 whether that approaches the level of managerial control over
19 the details of the work to qualify for employer status or to
17:13 20 create some kind of agency relationship.

21 The case law is resoundingly negative, rejects
22 that position, for some of the same policy arguments that
23 you've raised, that 'We're being a good citizen here. Why
24 should that subject us to expanded liability for their
17:13 25 ports?

1 But it's -- I'm not aware of any closer
2 analogy and wondered if you were. And I am going to ask the
3 Plaintiffs the same question.

4 MR. DOVE: No. I am aware of no similar analogy at
17:13 5 all.

6 Thank you.

7 THE COURT: All right. Thank you.

8 Is the best way to proceed to have a response
9 to these arguments?

10 MR. BURCK: Probably, Your Honor.

11 THE COURT: All right. Let's have it.

12 MR. BURCK: May it please the Court. Your Honor,
13 Mark Burck here on behalf of the Plaintiffs. And what I am
14 going to do is respond to the arguments about the factual
17:13 15 allegations in the Plaintiffs' Second Amended Complaint and
16 why they are sufficient enough to get us to the next stage
17 of this litigation, which would be on discovery.

18 I don't want to tell the Court a whole bunch
19 of standards that the Court already knows, but I do want to
17:13 20 remind everyone that the facts as alleged in our Second
21 Amended Complaint, since this is a 12(b)(6) motion, are
22 assumed to be true.

23 THE COURT: The non-conclusory factual allegations.

24 MR. BURCK: Thank you.

17:13 25 As the Court herself has recognized as

1 recently as the *Abecassis* case, detailed factual allegations
2 are not required. Facts that allow the court to draw a
3 reasonable inference is all that is required.

4 THE COURT: I am not going to argue. It sounds
17:13 5 like it was brilliantly stated.

6 MR. BURCK: It was brilliantly written.

7 In the other cases, Judge, a valid complaint
8 is one that raises a reasonable expectation that discovery
9 will reveal evidence of the illegal conduct. Okay?

10 Now, here's what I want to talk about, Judge,
11 and it kind of goes to Academy and Aramark; so, I am going
12 to group them together, and if there's a distinction or if
13 you believe there is a distinction, ask me and I will let
14 you know. But both Academy and Aramark had actual knowledge
17:13 15 of what was going on, and I say that because --

16 THE COURT: Are you being precise as to when that
17 knowledge arose or is that irrelevant for your argument?

18 MR. BURCK: I can be precise. Academy knew and
19 Aramark knew on March 12th and March 13th of 2008 and they
17:13 20 knew because Dr. Thang of Boat People SOS sent a letter to
21 both companies and told them what was going on. It's
22 alleged in our complaint. The letter itself -- both letters
23 are attached as exhibits us to our response. The letters
24 themselves are addressed in the complaint on Page 21.

17:13 25 THE COURT: Yes. I have got the letters.

1 MR. BURCK: Okay. So, my point, Judge, is -- 'You
2 know, we're trying to be the good guys' is what I just heard
3 a minute ago. Well, good guys who have been put on actual
4 notice of human trafficking, slavery and forced labor would
17:13 5 probably do something about it. We don't have anything in
6 any of the responses from any of the documents that have
7 been filed that they did anything.

8 THE COURT: But that doesn't go -- I mean, that
9 addresses some of the policy implications of the position
17:13 10 you're taking, but that doesn't go to whether entering into
11 a contract with a supplier is sufficient to trigger the kind
12 of agency or joint employer status that you have raised.

13 MR. BURCK: Yes, ma'am. The reason I went with the
14 actual knowledge first is because I think it's a much
17:13 15 stronger argument that they had actual knowledge of what was
16 going on and decided not to do anything about it.

17 Let me address the issue that you just asked
18 about. I am going to address the factual allegations and
19 the factual issues and Ms. Bang is going to address the
17:13 20 legal arguments about it.

21 THE COURT: All right.

22 MR. BURCK: Here's what the facts are, Judge. The
23 facts are that Academy and Aramark both have these contracts
24 with these independent third-party auditors. I think that's
17:13 25 what you're talking about. They both have on their web

1 sites corporate policies and procedures that tout the fact
2 that they use these independent third-party auditors.

3 THE COURT: They use them for lots of things,
4 though, don't they?

17:13 5 MR. BURCK: Oh, yes, ma'am. There's no doubt about
6 it. In fact --

7 THE COURT: It's pretty standard, isn't it?

8 MR. BURCK: I'm sorry?

9 THE COURT: It's pretty standard, isn't it?

17:13 10 MR. BURCK: I think it is standard, Judge, but
11 let's look at the --

12 THE COURT: Isn't it standard in every
13 manufacturing supplier contract that there is a -- not every
14 one -- and I don't mean to expand the record indefinitely --
17:13 15 but the fact that if -- I am a company and I enter into a
16 contract here in the United States with a vendor supply
17 company down the street to supply my need for tablecloths.
18 Okay? And I really want those tablecloths to meet
19 specifications; so, I put into the contract that I have a
17:13 20 right to send an audit team in there to inspect to make sure
21 that --

22 MR. BURCK: Absolutely.

23 THE COURT: -- these are made of the right fabric,
24 they're the right size, the stitching is proper, all the
17:13 25 other bells and whistles. Are you saying that that subjects

1 me to liability for the conditions in that manufacturing
2 facility?

3 MR. BURCK: What I am saying is it subjects you to
4 liability if there's something going on in there that you
17:13 5 could or should have known about but didn't bother to
6 follow up.

7 THE COURT: Well, let's say I walk in one day and
8 somebody is smoking marijuana in the corner. Let's say I
9 walk in some day and I see evidence of -- I see a racial
17:13 10 exchange, somebody is using racially charge epithets or I
11 see -- There are any number of possibilities. Let's say I
12 see a -- there is a puddle of water on the floor and, before
13 I get around to saying anything about it, somebody slips and
14 is gravely injured. I mean, am I liable for all of those
17:13 15 things because I am a joint employer or because I am some
16 sort of agent or even principal? That's a pretty broad --

17 MR. BURCK: May I ask you a question?

18 THE COURT: Sure.

19 MR. BURCK: Who is the person that went over there?
17:13 20 Is it the auditor or is it the actual company?

21 THE COURT: It's the auditor.

22 MR. BURCK: Okay. I think in that situation, as in
23 this situation, these companies, Aramark and Academy, hire
24 these auditors to be their eyes and ears, because --

17:13 25 THE COURT: For every purpose?

1 MR. BURCK: Yes, ma'am.

2 THE COURT: So, that for anything that happens in
3 that plant I am liable because I have an auditor who could
4 have seen it?

17:13 5 MR. BURCK: Who should have seen it and should have
6 reported it.

7 THE COURT: Boy. No company will ever hire an
8 auditor again, which I think is their argument. But that's
9 amazing. That means that, if an auditor is onboard and was
17:13 10 in a position to have seen something untoward, the company
11 that hired the auditor is liable for everything the auditor
12 could have reported but didn't? Is that really what you're
13 arguing?

14 MR. BURCK: No. Should have reported. Saw it, has
17:13 15 the information.

16 THE COURT: Fine. Same question. That's your
17 argument?

18 MR. BURCK: Yes, ma'am. What's interesting in this
19 case is --

17:13 20 THE COURT: Does the Restatement of Torts go that
21 far?

22 MR. BURCK: No. What's interesting in this case,
23 Judge --

24 THE COURT: Then, what's your authority?

17:13 25 MR. BURCK: -- the Academy auditors were collecting

1 information as minute as how long these workers were working
2 every day, what they were being paid, what the output
3 production per worker was.

4 THE COURT: What's your authority for the legal
17:13 5 proposition that that subjects the company that hired the
6 auditor to liability for everything that the auditor should
7 have reported? And we're setting aside for the moment the
8 legal obligation of the auditor to report to anybody beyond
9 the company that hired him.

17:13 10 MR. BURCK: Ms. Bang will address the legal
11 arguments, Your Honor. I am still talking about the facts.

12 THE COURT: All right.

13 MR. BURCK: Thanks.

14 And the reason I bring that up, Judge, is
17:13 15 because the standard against Academy and Aramark is either
16 what they knew or should have known under the TVPRA; and
17 it's our belief, based on the facts as alleged, that they
18 certainly knew or should have known what was going on and
19 the facts and the abuse that my clients --

17:13 20 THE COURT: Because the auditor knew or should have
21 known it?

22 MR. BURCK: Yes, ma'am. Academy is quick to point
23 out in their reply that even though they hired these
24 auditors they, really, never even see the information that
17:13 25 the auditors gathered. And, so, it kind of begs the

1 question why do they have these corporate policies and why
2 do they tout on their web site that they're in compliance
3 with all of these social norms if they don't bother to
4 either follow up, enforce it or follow their own policies?

17:13 5 I mean, it sounds to me like they're trying to use it as a
6 shield for liability.

7 If they had these corporate policies -- which
8 are good and I'm not suggesting they get rid of them -- but,
9 if they had these corporate policies, what good is it if
17:13 10 they don't follow up and what good is it if they don't
11 enforce their own policies and follow up on their own
12 conduct?

13 THE COURT: All right. Thank you.

14 MR. BURCK: Your Honor, the last thing I would like
17:13 15 to address, if you don't mind, is some of the specific
16 factual allegations that are made in the Plaintiffs' Second
17 Amended Complaint. There are factual allegations that begin
18 on Page 17 and continue through Page 21 that specifically
19 give rise to plausible claims as alleged by the Second
17:13 20 Amended Complaint, that is:

21 My client's passports were confiscated. My
22 clients were misled to go to this job in Jordan that didn't
23 turn out to be anything like they thought it was going to
24 be. They didn't get paid as much. They were required to
17:13 25 work 18-hour days. Their food was restricted. Their living

1 conditions were not as promised. And when you take those
2 facts and apply them to the Second Amended Complaint, as
3 Judge Ellison wrote in the *Adhikari* case -- "Whether these
4 allegations if proven will lead to a plaintiff's verdict is
17:13 5 irrelevant at this stage. Under *Iqbal* all that is required
6 at this pleading stage is that the claims made by the
7 Plaintiffs are plausible, not that they show probability of
8 success."

9 THE COURT: Right.

17:13 10 MR. BURCK: "By providing significant, though not
11 indisputable, factual support for their allegations of
12 trafficking, Plaintiffs meet that burden."

13 Judge, our burden in this case at this stage
14 is to simply allege facts that give rise to plausible causes
17:13 15 of action, and we have done that.

16 THE COURT: All right. Thank you.

17 MR. BURCK: Thank you, Your Honor.

18 THE COURT: I think it's most useful now for me to
19 hear about the law and then we can hear a response on that.

17:13 20 MS. BANG: Good afternoon, Your Honor. The issue
21 that I wanted to address today, since it's been the subject
22 of some discussion in the motions that we received, is the
23 joint employer issue. And we're asking the Court to apply
24 the economic reality theory that's been enunciated by the
17:13 25 *Pilgrim* court here in our own Fifth Circuit.

1 THE COURT: Has anybody done it in this context?

2 MS. BANG: Your Honor, the *Pilgrim* case we think is
3 a good analogy.

4 And just to give it a little background, I
17:13 5 know there are these different theories and there has been a
6 lot of discussion about the *Wal-Mart* case. In that case I'd
7 like to say that it uses a completely different analysis
8 using -- it's completely distinguishable from the one in
9 Texas. We're here in Texas. They're in California and they
17:13 10 use a completely different analysis to which, obviously, led
11 to a different result. We're asking Your Honor to apply the
12 economic reality test here in this case.

13 THE COURT: Just setting aside the application of
14 it to this context for a moment, this is not a Texas cause
17:13 15 of action.

16 MS. BANG: Yes.

17 THE COURT: There are some common law claims, but
18 we're focusing on the statutory claims right now.

19 MS. BANG: Yes, Your Honor. And I understand that
17:13 20 a lot of the cases do depend, even at the Supreme Court
21 level, on -- the *Silk* case and the *Bartels* case -- that
22 there are stemming from FLSA. And I think, actually, that
23 helps us because, if you look at the legislative history of
24 the FLSA and workmen's compensation and the NLRA and some of
17:13 25 the other federal statutes upon which this type of analysis

1 is applied, it is analogous to what's in our case because
2 that --

3 THE COURT: But the economic realities test focuses
4 on -- one of the primary factors is the ability of one party
17:13 5 to control the specific ways in which the work is done.

6 MS. BANG: Yes, Your Honor.

7 THE COURT: And that gets us back to the same
8 issue. Is the type of evidence that you have submitted of
9 control sufficient to support any kind of joint employer or
17:13 10 principal agency relationship under the case law that you
11 have pointed to?

12 MS. BANG: If I may, under both analysis -- Let's
13 first start maybe with the *Pilgrim* analysis with the
14 different factors you can compare and then I'll move on to
17:13 15 the Texas common law of joint employment and clear, which I
16 also believe we have satisfied in this.

17 THE COURT: Have you seen that applied in anything
18 like this fact pattern?

19 MS. BANG: If I could address it just a little bit
17:13 20 later after I get to this.

21 THE COURT: All right. That's fine.

22 MS. BANG: In the *Pilgrim* case the Fifth Circuit
23 has said, really, the analysis is dependent on the economic
24 realities of the work relationship. It involves a balancing
17:13 25 of many different factors, and there is a focus on the

1 dependency of the worker and how they -- the whole process
2 is vis-à-vis the worker, how dependent are they on the
3 employer. And in this case we believe that the facts set
4 forth in the complaint show that the worker was highly
17:13 5 dependent not only for their livelihood in this case but for
6 their lives.

7 Certain factors of the *Pilgrim* court used was
8 who set the prices, who was able to set the -- maintain the
9 right to enforce or declare the contract void.

17:13 10 We believe that discovery will show that there
11 really wasn't arm's length negotiation. We believe that
12 discovery, if the Court permits it later on, will show that
13 they weren't really independent contractors; they were more
14 like dependent contractors, in which case these workers were
17:13 15 totally at the mercy of the corporation.

16 In the *Indian Harbor* case there were many
17 factors and I understand that there are all these factors
18 that show control of the employer. But I believe, even
19 looking at Academy's Smart Guide or looking at some of the
17:13 20 vendor policies, there is a high level of control on the
21 very minute details from hundreds of dollars if you don't
22 ship it the right way, another \$75 if you don't fold it the
23 right way. The minutia of control over every aspect of the
24 production we believe shows a high level of control of the
17:13 25 company.

1 In Southeast Asia there are thousands and
2 hundreds of subcontractors that would love to have the job
3 of W&D and Wells and David. They're fungible. If they did
4 not exist we would not have this case, but we need the
17:13 5 Aramarks and Academies in order to make this happen. So,
6 the worker is highly dependent on these two corporations.

7 And also turning to -- if you don't want to
8 accept the economic realities test, which we submit is more
9 expansive than what's really out there, we would even -- we
17:13 10 would ask the Court to turn to Texas law, and even in Texas
11 law they're pretty expansive using the common-law analysis.
12 When an employee's work simultaneously benefits two
13 employers they're both liable. The employer may serve two
14 masters even if they're not related in any way.

17:13 15 So, in this case, even if there's not any
16 partnership --

17 THE COURT: But there has to be a lot of other
18 criteria satisfied before that can occur.

19 MS. BANG: Well, we believe that we do fit -- we do
17:13 20 fulfill many on the list, Your Honor. There are -- even in
21 the *Pilgrim* case, Your Honor, I mean, there was who set the
22 prices. We believe that Aramark and Academy knew by
23 imposing these price ceilings and these deadlines that it
24 would lead to forced labor.

17:13 25 If you have a soccer ball uniform and you say,

1 'Okay. You produce this for five dollars' and you know the
2 raw materials, which is a fixed fee, is \$4.50, you have
3 50 cents left over. Something has got to give. If that's
4 your profit and that's your work, it's going to be the
17:13 5 workers that suffer.

6 So, we think that Aramark and Academy and
7 other corporations, although that's not an issue today, they
8 know when they set these price ceilings and these deadlines
9 and turnaround times that something has got to give, and in
17:13 10 this case it's the forced labor that's happened.

11 So, both the economic reality theory, in terms
12 of the joint employer under the *Pilgrim* case, as well as
13 common law, supports our theory that they were joint
14 employers. They are responsible for what happened.

17:13 15 And I just wanted to address the issue again
16 that in the footnote by Aramark that they did mention, well,
17 these cases are not really relevant here because they are
18 tied to federal statutes and have nothing to do with this
19 case. The legislative history for a lot of these statutes
17:13 20 which were enacted in the 1930s were made to address the
21 evils of society, including child labor, the low wages, the
22 long hours, and we submit that that's exactly the situation
23 here. It's completely relevant to apply it to this case.

24 The Fifth Circuit even said in the *Pilgrim*
17:13 25 case that "Employers should not escape liability by

1 deliberately structuring a permanent and exploitative
2 economic relationship with workers for that purpose."

3 So, we submit that -- we would ask Your Honor
4 to apply the Fifth Circuit law here and find them to be
17:13 5 joint employers.

6 THE COURT: All right. Thank you.

7 If you want to respond.

8 MR. DOVE: Very briefly, Your Honor.

9 Your Honor, I thought that a few of the
17:13 10 comments that were made deserved a brief response.

11 First, Mr. Burck claimed that we received an
12 actual notice. What he is referring to is the fact that
13 Boat People sent an unsolicited letter to us toward the end
14 of the labor strike that said nothing about Academy's
17:13 15 involvement, that they have no evidence we ever received.
16 We certainly don't know anything about it. And it's unclear
17 to me how that would provide actual notice, considering that
18 it was sent at the end of the labor strike.

19 When you compare that to their other evidence
17:13 20 that they have put on -- for instance, Exhibit 7 to
21 Aramark's -- to their response to Aramark's motion, it seems
22 quite clear that they never thought Academy or Aramark did
23 anything until, apparently, the eve of filing this lawsuit.
24 They don't allege anything against us. They never thought
17:13 25 that we had any involvement, certainly that we were not a

1 principal or an employer.

2 Mr. Burck said that we never see the
3 information gathered by our auditors. I have no idea where
4 he got that. From our pleadings, that is not true.

17:13 5 What is true is that they have no evidence
6 that our auditors ever told us of any wrongdoing.

7 THE COURT: Well, they haven't alleged any.

8 MR. DOVE: They haven't alleged it. True.

9 He wants to compare the case to *Adhikari*, and
17:13 10 I could understand why he would want to do that as an
11 advocate.

12 The distinction here is fairly significant.

13 In *Adhikari* the allegations were a much
14 greater knowledge and a much greater amount of control. The
17:13 15 claim was here come the workers back from this horrible
16 situation. They are reporting to the defendant, 'Oh, my
17 gosh. I got sent somewhere I was never told I was supposed
18 to go,' and they reported it directly, that, also, there
19 were reports of these specific allegations that were given.

17:13 20 None of that is true here. The allegations of
21 our knowledge are scant or zero.

22 The other claim that was in *Adhikari* was that
23 they controlled, minutely, the work that was done by these
24 workers. Here, there is no allegation that we controlled
17:13 25 the work. Even if you take all of their allegations, even

1 the implausible ones, they claim we controlled the product
2 we received, not wages, hours, conditions, withholding tax,
3 where they sleep, what they eat. Nothing. We had no
4 control over that whatsoever. This case is not like
17:13 5 *Adhikari*.

6 Ms. Bang continues to press the "joint
7 employment" theory, and I would just remind the Court I
8 still cannot understand how it could possibly apply in this
9 case. Did the worker start working for Academy when it
17:13 10 worked on something with one labor, stop working for Academy
11 when it moved over to another table and started working on
12 something for Aramark --

13 THE COURT: They were lots of joint employers,
14 apparently.

17:13 15 MR. DOVE: The entire American importing public,
16 apparently, is a joint employer of every foreign worker
17 everywhere. It sounds absurd, because I don't know how to
18 stop it before it gets absurd. Everybody is exposed.

19 And, finally, Ms. Bang candidly conceded that
17:13 20 the reason why they're asserting this theory is they want to
21 put pressure on Academy and Aramark to go to different
22 vendors that apparently they think are better, having failed
23 to prove any reason why there's anything wrong with the one
24 we use.

17:13 25 I would just comment: Surely, the way to

1 persuade a corporation is not to sue them for human rights
2 violations without evidence.

3 Those are the end of my comments. Thank you.

4 THE COURT: All right.

17:13 5 Anything further on this set of issues before
6 we move to your part of it?

7 MR. BURCK: Your Honor, may I just --

8 THE COURT: Sure.

9 MR. BURCK: Two quick points. Do you want me to go
17:13 10 up there?

11 THE COURT: It doesn't matter. Wherever we can
12 hear you. Pull the mic up closer to you. Thank you.

13 MR. BURCK: You certainly have the letters that
14 were written to Academy and Aramark here.

17:13 15 THE COURT: I do.

16 MR. BURCK: They talk about what's going on and
17 what has happened and what is happening. They're very
18 specific as to what's going on.

19 The only other comment I want to make, Judge,
17:13 20 is that in Academy's reply, on Page 4, where they're talking
21 about the Customs compliance and all the information that
22 the vendor gathers and what the vendor does with it -- and I
23 will quote -- "These documents are kept by the vendor.
24 Academy never sees them unless and until U.S. Customs
17:13 25 performs an audit." That's where I got it from, Judge.

1 Academy never sees that. That's their words.

2 Thank you.

3 MR. DOVE: He is referring to the manufacturer's
4 records of the sourcing of items, not our audit reports,
17:13 5 which is what he said earlier.

6 THE COURT: Do you disagree with that?

7 MR. BURCK: Yes, I do, Your Honor.

8 THE COURT: On what basis?

9 MR. BURCK: The Customs compliance reports are the
17:13 10 reports that are kept by the auditor about who works on
11 what, how long do they work on it, where does the fabric
12 come from, who cuts it, who sewed it, what label went into
13 it, what box did it go in. That's the information that they
14 have access to that they never bothered to look at unless
17:13 15 there's a Customs problem.

16 THE COURT: Did you want to point me to where in
17 the record I can get clarity on that?

18 MR. DOVE: If you choose to look at their exhibit,
19 the PowerPoint presentation they draw that from, it does not
17:13 20 say anything of the sort. All it says is "You,
21 manufacturer, need to keep these records because if Customs
22 does an audit, Customs, not the third-party auditors that we
23 hired to go and check for human rights violations" -- "if
24 Customs were to do an audit they will turn to us and say,
17:13 25 'You must provide these documents.' We will turn to you and

1 say 'Provide the documents.' We don't keep them. And if
2 you don't provide the documents we have it in our contract
3 that we can deduct the costs of any Customs confusion from
4 the next order." That's all it says. That's all the
17:13 5 PowerPoint says and I don't understand where Mr. Burck is
6 getting this interpretation.

7 THE COURT: All right. Thank you. It's helpful.

8 All right. Go ahead, please.

9 MS. KROPF: Good afternoon, Your Honor.

17:13 10 Your Honor, there are two federal statutes
11 that are at issue on TVPRA and the Alien Tort Statute. I am
12 happy to handle them in either order you'd like, but I
13 thought I would start with the TVPRA.

14 THE COURT: That's fine.

17:13 15 MS. KROPF: Your Honor, the Plaintiffs are moving
16 under 1595(a) which allows for civil liability. It allows
17 for civil liability, though, only when the defendant
18 participated in a venture which that person knew or should
19 have known engaged in some wrongdoing, and the Plaintiff
17:13 20 simply has not met that standard here. There are two
21 primary reasons.

22 The first is that the statute requires this
23 participation in a venture. Congress chose its words
24 carefully. It didn't just say if you receive some goods
17:13 25 from a supplier overseas you're personally liable. It added

1 more. It said you have to participate in a venture.

2 Unfortunately, Congress didn't add as much as
3 we would have liked. It doesn't define "participation" and
4 it doesn't define "venture" for the purposes of the civil
17:13 5 liability provision in the TVPRA.

6 However, the Fifth Circuit has defined
7 "participation" for aiding and abetting, at least, in the
8 criminal context and defines it as "an affirmative act to
9 aid the venture"; and there's no showing here by the
17:13 10 Plaintiffs, no allegation, that Aramark did anything to aid
11 a supposed venture by the factories overseas.

12 Now, the *Adhikari* case is probably the closest
13 case, and we all admit that the facts there are probably the
14 closest of any case. It's a case against a company. It's a
17:13 15 case under the TVPRA. But the facts there alleged in the
16 complaint -- not attached to an opposition many months later
17 but included in the complaint -- were not only that KBR had
18 a contract but that KBR took, quote-unquote, a concrete act
19 to assist that venture, and that's entirely different from
17:13 20 what happened here.

21 Now, the Plaintiffs allege lots of wrongdoing
22 in Jordan and they have talked a lot about Academy and
23 Aramark's compliance policies. And we take those policies
24 very seriously, and those policies are exactly to do what
17:13 25 Your Honor suggested, which is to prevent these type of

1 things, and they're trying to turn that around on us.

2 What happened in *Adhikari* is very different
3 from what is alleged here, and we submit that it makes that
4 case distinguishable, and the TVPRA cannot be applied here
17:13 5 and those counts should be dismissed.

6 The second reason that the Plaintiffs'
7 allegations under the TVPRA failed is because they haven't
8 reached the "knew or should have known" standard. I was a
9 little confused, I admit, by Plaintiffs' argument about
17:13 10 whether or not they're relying on "knew or should have
11 known".

12 THE COURT: I think both, depending on what the
13 auditor knew or should have known.

14 MS. KROPF: Fair enough.

17:13 15 As far as knowledge, let's look at the
16 complaint, and the complaint says only this: "Academy and
17 Aramark were on notice of the treatment of the workers."
18 That's it. It doesn't say what treatment they were on
19 notice of. Were they on notice of how big the room was?
17:13 20 Whether or not they were sitting or standing? What they
21 were wearing? Nothing. All it says is that we were on
22 notice of the treatment.

23 It doesn't say when that notice happened
24 precisely, which is important here. It seems odd to be
17:13 25 arguing about a couple of days or maybe a couple of weeks,

1 but it's critical here. The complaint alleges that we
2 received notice in March of 2008. The complaint also
3 allegations that all of this wrongdoing, all of this bad
4 conduct, this short-lived period, ended on March 29th.

17:13 5 So, the complaint gives no fair notice and no
6 allegation that we received notice anywhere close to the
7 beginning, the end, the middle. And it could be read that
8 we received notice on the very last day. It could be read
9 they say we received notice the day before.

17:13 10 We called the factory. We said, 'Stop it.
11 Get them out of there' and they sent them home. That is not
12 enough to meet the TVPRA and it's not enough what's alleged
13 in the complaint.

14 Now, the -- Oh. What is also alleged in the
17:13 15 complaint gets to their "should have known theory", which is
16 our compliance policies.

17 I think Your Honor has already discussed those
18 and asked some questions in some detail. But the compliance
19 policies themselves -- They don't attach Aramark's
17:13 20 compliance policies. As I read them, they attach our
21 auditors' own compliance policies to the auditors'
22 employees. But even assuming those are our policies -- they
23 look like good policies to me -- that doesn't create a
24 "should have known" standard of knowledge. All that means
17:13 25 is that Academy or Aramark engaged in the best practices

1 possible to try to prevent this kind of conduct, and to
2 expect a company to have those policies and then to invite
3 this kind of liability simply by having those policies makes
4 no sense.

17:13 5 Now, we might be in a different situation if
6 they had alleged that our auditors went there, saw these
7 folks locked up --

8 THE COURT: And reported them?

9 MS. KROPF: I'm sorry?

17:13 10 THE COURT: And reported what they saw?

11 MS. KROPF: And reported what they saw. If that
12 were the case here, if that is what was fairly alleged, we
13 might be in a different situation, but, as Your Honor knows,
14 that is not what is alleged. All that's alleged is that we
17:13 15 had auditors, auditors conducted audits at some point, not
16 during this short six-week period that we are discussing
17 here. There is just no allegation of it. So, we don't
18 believe it reaches that "should have known" standard.

19 Now, of course, the elephant in the room is
17:13 20 the letter. That, Your Honor, as you well know, was not
21 included in their complaint, it was not referred to in their
22 complaint and there is really no explanation for why it
23 wasn't. It was written by a party. It's not as though the
24 Plaintiffs didn't have it, it was recently discovered or
17:13 25 what have you.

1 So, even if Your Honor is going to consider
2 it -- which we believe you should not because it wasn't
3 included or referenced -- that does not meet the standard of
4 knowledge of "knew or should have known".

17:13 5 Your Honor, the letter, when I first read it,
6 I kind of stopped and reread it and reread it a few times.
7 It was written to Aramark. It was written about some of the
8 wrongdoing, although, interestingly, not the most serious of
9 wrongdoings. Nowhere does the letter say, 'Hey, Aramark.
17:13 10 Your workers have been locked up for a month.' That makes
11 absolutely no sense.

12 Putting that aside, this is a letter written
13 to the CEO of a major multinational corporation from some
14 group that has no prior relationship with the company
17:13 15 alleging things happening in Jordan, and the idea that that
16 standing alone could constitute actual knowledge of a
17 trafficking scheme that Aramark and Academy were supposedly
18 a part of simply doesn't make sense. If that were true, any
19 interest group could write a letter to any corporation
17:13 20 placing them on notice of whatever is happening, whatever
21 they believe it is, and that's just not how corporate
22 America works.

23 The other thing to consider is the timing.
24 The letter to Aramark is dated March 12 and the affidavit
17:13 25 authenticating it says it was sent by regular mail. So, it

1 was sent. I am sure it took a few days to get there. I am
2 sure it took many days to get through the corporate
3 processing. So, who knows when Aramark actually knew, when
4 someone there actually sat down and read it and looked at
17:13 5 it.

6 So, just that letter standing alone does not
7 get them to actual knowledge, even if you are going to
8 consider it, which we do not believe you should.

9 As far as the TVPRA, Your Honor, that's all I
17:13 10 have unless you have questions.

11 THE COURT: No. I think I am following so far.

12 Perhaps we should now turn to Plaintiffs and
13 get their responsive arguments on the TVPRA so we have those
14 issues before us.

17:13 15 MS. HENRY: May it please the Court. My name is
16 Shea Henry and I'll be addressing the TVPRA as it applies to
17 the Plaintiffs and why both Aramark, Academy and Well and
18 David are potential defendants and the correct named
19 defendants as provided by the statute.

17:13 20 I'd first like to draw the Court's attention
21 to the standard which was articulated in defense counsel's
22 argument about 1595, the civil remedy and the TVPRA.

23 She particularly ignored the parenthetical
24 "or" which follows "participation in a venture". And I
17:13 25 think the statutory language is the key to understanding the

1 entire TVPRA issue and it reads that "Any victim may bring a
2 civil action against the perpetrator (or whoever knowingly
3 benefits financially or by receiving anything of value from
4 participation in a venture which that person...should have
17:13 5 known has engaged in an act is a violation of this
6 chapter)..." Those words, in and of themselves, encompass
7 the entire chapter of the TVPRA which sets forth the
8 criminal predicates for civil liability.

9 And, so, the standard is, yes, "should have
17:13 10 known", and she went into an in-depth discussion of that,
11 but it's anyone who receives anything of value. And it's
12 Plaintiffs' position that they have properly alleged in the
13 Second Amended Complaint that Aramark, Academy and Well and
14 David all received something of value as set forth in the
17:13 15 statute, whether it be apparel that came to the United
16 States or whether it be a financial benefit, but the
17 standard as provided by the statute is receiving anything of
18 value. It does not even have to be financial.

19 THE COURT: So, it's a very low threshold?

17:13 20 MS. HENRY: Exactly.

21 Second, I'd like to address the facts in the
22 *Adhikari* case.

23 Defense counsel spent some time talking about
24 the knowledge and the conduct that KBR had as it pertained
17:13 25 to the TVPRA forced labor. Plaintiffs have alleged in their

1 complaint on several occasions that that is exactly what
2 Academy and Aramark and Well and David did as either joint
3 employers or even having a contractual relationship where
4 there was knowledge or some sort of "should have known" or
17:13 5 even saying, 'Look. I know I am getting something from you,
6 whether it be apparel, whether it be some sort of financial
7 benefit.' That's the threshold for the civil remedy. And
8 then that civil remedy opens up the door for the other
9 criminal predicate act set forth in 1589 and 1590 of the
17:13 10 TVPRA. And the complaint specifically quotes that language
11 of "forced labor" and it is exactly the situation we have
12 here and same in the *Adhikari* case.

13 The *Adhikari* case, which Judge Ellison also
14 addresses in his opinion, it was -- yes, it was pre-*Morrison*
17:13 15 which they spent some time discussing, but it also was pre-
16 2008 amendment of the TVPRA, and the 2008 amendment of the
17 statute expanded civil liability, opened the door to even
18 further extraterritorial application, and the statute is now
19 more expansive. As more research was done, as the
17:13 20 Department of Labor put more reports forth, Congress
21 intended to broaden the scope of the statute, and that's
22 exactly what happened in 2008.

23 It's the Plaintiffs' position that the TVPRA
24 specifically provides that a victim of this trafficking
17:13 25 previously in 2005 could only bring an act against the

1 trafficker. Now, in 2008 and as the statute still stands, a
2 victim like the Plaintiffs in this case who were subjected
3 to forced labor, whether it be for a few days, whether it be
4 for six weeks, forced labor is forced labor as defined by
17:13 5 1589 and that's exactly what happened here.

6 Now, in 2008, when the statute was amended, it
7 opened the door for the Plaintiffs to be able to bring a
8 cause of action against anyone who financially benefits or
9 receives something of value in any violation of this
17:13 10 chapter. The entire Chapter 77 and the Plaintiffs allege
11 1589, 1593 --

12 THE COURT: If I buy a cheap shirt am I exposed?

13 MS. HENRY: No, Your Honor, because you are not
14 actively pursuing the means by which that shirt is made.

17:13 15 THE COURT: I do a lot of shopping for cheap
16 shirts. I go to Academy. I mean, I don't, but for the
17 purpose of this question. I mean, that's a very broad
18 approach.

19 MS. HENRY: Absolutely. And I am sure we all
17:13 20 engage in some sort of retail --

21 THE COURT: Indirect beneficiaries of the
22 inexpensive apparel that the process produces.

23 MS. HENRY: Absolutely.

24 THE COURT: You're not arguing that that's enough.

17:13 25 MS. HENRY: No, Your Honor. I am simply arguing

1 that the civil remedy as set forth by the statute sets
2 forth -- it's an "or" test. It's not an "and". You can
3 either actively participate or if you know what's going on
4 when you should know. As a third-party person going to a
17:13 5 retail store, we don't know how that --

6 THE COURT: We read a lot of stuff. We read about
7 terrible conditions throughout the supply network. How
8 could you say we don't know? We may not know particulars,
9 but there is perhaps a broad -- If the standard is "should
17:13 10 have known", you could argue that there's enough information
11 in the news media that would put many of us on notice, if
12 not all of us on notice, that many of the products that we
13 are producing are the result of practices that we would find
14 abhorrent. What do you do with that?

17:13 15 MS. HENRY: That may be the case of what happens on
16 a day-to-day basis, but that is not the case of what the
17 legal statutory remedy is.

18 THE COURT: But that's the very argument that is
19 used in some cases, to assert that there is knowledge; that
17:13 20 is, that corporations that enter into contracts have
21 knowledge of the conditions used to carry out those
22 contracts because the news media provides that.

23 MS. HENRY: And if that were the case, which is not
24 the case in the case before the Court, then --

17:13 25 THE COURT: Because there was no news coverage of

1 the conditions in Jordanian plants used to fill contracts
2 for clothing destined for American sport shops?

3 MS. HENRY: It was higher than a media standard
4 even. It was published by the Department of Labor. It was
17:13 5 a part of the trafficking report that we all -- our Congress
6 people who represent us put that together so that
7 corporations like Aramark and Academy may have that at their
8 fingertips.

9 THE COURT: Okay. So, if it's in there, that's
17:13 10 enough?

11 MS. HENRY: Yes, Your Honor. And there are several
12 cases that apply civil law to the criminal predicate, all of
13 the subsections of the TVPRA, to impute the liability.

14 THE COURT: I have your argument.

17:13 15 MS. HENRY: Would Your Honor like me to address the
16 extraterritorial issue now?

17 THE COURT: Sure.

18 MS. HENRY: Mr. Pecht spent some time in his
19 argument talking about his statutory interpretation and the
17:13 20 language of the TVPRA and 1596. I'd like to first address
21 the *Morrison* case.

22 The *Morrison* case was --

23 THE COURT: I am familiar with the facts and the
24 procedural status.

17:13 25 MS. HENRY: The holding in *Morrison*, if anything,

1 supports Plaintiffs' argument that there is a clear
2 congressional intent in the TVPRA to apply
3 extraterritorially. 1596, which is the new part in 2008, it
4 specifically uses that word "extraterritorial" and then it
17:13 5 references a few subsections, one of them being 1589 and
6 1590 which are the basis for our forced labor. Those two
7 subsections are the criminal predicate for civil liability.

8 Defendants are contending that simply because
9 1596 doesn't address 1595 that there is no extraterritorial
17:13 10 application to the civil causes of action, and case after
11 case have shown that's just not how it works. The statute
12 must be read in its entirety.

13 And if you look at the language of 1596 the
14 introductory clause says "in addition to other
17:13 15 jurisdictions". 1595 provides that jurisdiction by using
16 the words "in United States District Court," "any victim."
17 "Any victim" is pretty broad. That could be overseas. It
18 could be in the United States. It could be anywhere.

19 And, so, 1595, standing alone, looking at the
17:13 20 language of the statute, creates extraterritorial effect.
21 Also 1596. There is no way to look at the statute without
22 seeing that it has an extraterritorial effect.

23 So, *Morrison* will embrace that holding and say
24 that there does have to be a clear congressional intent, and
17:13 25 the TVPRA has that intent in the very language of the

1 statute for criminal and civil acts because it is the
2 criminal acts that create the predicate for the civil
3 remedies which *Plaintiffs* are seeking.

4 And, also, the TVPRA and the ATS can both
17:13 5 proceed simultaneously. Well and David argues that one
6 preempts the other or one occupies the field and, in doing
7 so, they have relied on the *Enahoro* case.

8 The facts in that case are different than the
9 facts here. The facts as alleged in the *Enahoro* case
17:13 10 wouldn't even satisfy the ATS because there was no prolonged
11 detention, and in order to bring a claim under the ATS you
12 have to violate some sort of international norm. There
13 wasn't that there. So, we can't apply it to these facts in
14 analyzing substantively whether or not the two federal
17:13 15 statutes can continue.

16 And, also, several federal district court
17 cases have shed light on the *Enahoro* case, specifically
18 *Chavez v. Chavez*. It's a Tennessee district court case.
19 Plaintiffs' allegations very similar to our case. Forced
17:13 20 labor, ATS and TVPRA proceed simultaneously.

21 Similarly, in *Adhikari* Judge Ellison even
22 specifically noted in that case the facts give plausible
23 causes of action to both of these statutes. 'Let's conduct
24 some discovery. If we need to change one at one point, then
17:13 25 that's the time to do it, not now.'

1 And, additionally, there is New York district
2 court cases that allow them to proceed together.

3 So, we have the Second Circuit, the Seventh
4 Circuit.

17:13 5 And then Well and David also tries to
6 distinguish our reasoning in the *Magnifico* case, that we
7 provided the reasoning for that in our response brief, and I
8 will just briefly tell the Court that the distinguishment
9 that Well and David tries to make doesn't make a difference.
17:13 10 It doesn't change the fact that both statutes can proceed,
11 because all Well and David says is, well, that's a different
12 case because the plaintiffs were in the United States in
13 that case, but the analysis, the substantive analysis, about
14 the statutes, the remedies that Congress intended for both
17:13 15 statutes, that's exactly the same, and we would urge this
16 court to adopt that same reasoning to allow both causes of
17 action -- TVPRA and ATS -- to proceed simultaneously.

18 The Plaintiffs are not attempting to recast.
19 There's two different statutes. They both provide for
17:13 20 separate civil remedies and we're bringing our claims
21 against both of those statutes separately.

22 THE COURT: All right. Thank you. It was very
23 helpful.

24 Anything else on this set of issues?

17:13 25 Go ahead, Mr. Pecht.

1 MR. PECHT: Your Honor, very briefly on the TVPRA
2 as applies to my client, my foreign client.

3 If you look at 1595 --

4 THE COURT: Your client has a somewhat different
17:13 5 position.

6 MR. PECHT: Yeah. We're a foreign corporation.
7 We're not U.S. But if you look at 1595 there is no mention
8 of extraterritoriality at all. That's the civil provision.
9 If Congress wanted to, it knows how to make it
17:13 10 extraterritorial, and *Morrison* said, when it doesn't, it
11 doesn't and you can't read it into the statute.

12 1596 does have an extraterritorial
13 provision -- this is the criminal side of it -- if the
14 alleged offender is a national of the United States or an
17:13 15 alien unlawfully admitted for permanent residence in the
16 United States or an alleged offender is present in the
17 United States, neither one of which applies to my client.

18 And the Fifth Circuit has said in the *Medical*
19 *Center Pharmacy v. Mukasey* case, where Congress includes
17:13 20 particular language in one section of the statute but omits
21 it in another section of the same act, it is generally
22 presumed that Congress acts intentionally and purposely in
23 the disparate inclusion or exclusion. So, they have
24 included it in one section, they have excluded it in
17:13 25 another, indicating that, with regard to the civil action,

1 it has no extraterritorial application; and, if you do apply
2 the extraterritorial standards that they use, it doesn't fit
3 my client for criminal actions.

4 MS. KROPF: Your Honor, just a few comments in
17:13 5 response to what Ms. Henry said.

6 First, she said that *Adhikari* was relying on
7 the version of the TVPRA before the amendment. That's
8 simply not true. The case was cited in 2009. In Footnote 1
9 they cite the statute that we're relying on today.

10 The second is Ms. Henry's argument that, if a
11 country is on this list that they attach, it somehow meets
12 the "should have known" standard and we shouldn't have done
13 business with them. That would include we couldn't do
14 business, I guess, with any factory in Brazil, China, India,
17:13 15 Mexico, Colombia, Philippines, Guatemala, et cetera. That
16 is simply not the case.

17 This is just a list by country. There's no
18 indication in this list that this factory had any -- that
19 the Department of Labor thought there were any problems
17:13 20 there and that they engaged in any trafficking.

21 So, relying on that standard does not meet the
22 "should have known" standard in the TVPRA.

23 And the final point, Your Honor, is that
24 Ms. Henry said that I did not cite or quote the entire
17:13 25 statute, yet when she talked about it she conveniently left

1 out the word "participation". I think that's exactly what
2 Your Honor was getting at. The reason that a buyer of a
3 cheap shirt is not liable if that shirt happened to have
4 been made by forced labor is because the statute says
17:13 5 "participation". It doesn't say you just got something of
6 value, because, frankly, as Your Honor pointed out, it
7 probably would be all of us, unfortunately.

8 The statute is very clear. It included the
9 word "participation" and we can't read that out of the
17:13 10 statute to simply read "anything of value from a venture
11 that used forced labor".

12 Unless Your Honor has further questions about
13 that, I will turn to the Alien Tort Statute.

14 THE COURT: All right. Let me just make sure that
17:13 15 Miss Henry doesn't want to add anything at this point before
16 we leave the --

17 MS. HENRY: The Department of Labor report that
18 they do on trafficking, it's not simply -- it doesn't simply
19 list countries. It lists them in the type of alleged human
17:13 20 rights violations that have occurred, whether it be --

21 THE COURT: But not in factory-specific sites.

22 MS. HENRY: By the --

23 THE COURT: But that still covers a lot of ground,
24 possibly.

17:13 25 MS. HENRY: They create a chart that says 'In

1 Jordan we have had reports of human rights violations for
2 apparel or for garments.' That creates some sort of "should
3 have known" standard.

4 THE COURT: A report of some violations of human
17:13 5 rights in a sector, in a country? Is that -- I just want to
6 make sure I have your argument. And I will look at the
7 exhibit, obviously.

8 MS. HENRY: If that corporation, that person or
9 whoever it may be is obtaining those exact services from
17:13 10 that country.

11 THE COURT: So, if I bought a shirt -- Well, I
12 guess I am a little puzzled, then -- and the "participation"
13 point may be the answer to this question -- but if I buy a
14 shirt that's made in Brazil and Brazil is on the list for
17:13 15 reports of human rights violations from the manufacturer of
16 apparel in Brazil, does that mean that I should have known
17 that the shirt I bought was manufactured by people working
18 under conditions that amount to forced labor?

19 MS. HENRY: If you are actively participating --

17:13 20 THE COURT: Participation is different from
21 knowledge. Participation can produce knowledge, but you can
22 have knowledge without participating. And what you just
23 argued is that that list gives knowledge. So, I guess my
24 question is: Is that enough?

17:13 25 MS. HENRY: Yes. That list gives knowledge and the

1 policy behind that list is to put people on notice like the
2 corporations.

3 THE COURT: So, everybody who is buying a shirt
4 from Brazil, if Brazil is listed as a source of human rights
17:13 5 violations reported in some instances in the apparel
6 manufacturers in that country, that should suffice?

7 MS. HENRY: Not entirely, but it should trigger
8 some sort of due diligence action.

9 THE COURT: Okay. I think I have your argument.
17:13 10 Thank you.

11 Anything furnish on that point?

12 MS. KROPP: No, Your Honor.

13 Your Honor, turning to the Alien Tort Statute:

14 Your Honor, the Alien Tort Statute, as you
17:13 15 know, allows for jurisdiction over a relatively modest set
16 of actions. Sosa by the Supreme Court was very clear that
17 it should be used sparingly, the court should act as
18 vigilant doorkeepers to keep out claims, and they should act
19 in great caution for allowing these claims to proceed.

17:13 20 And we have several arguments under the Alien
21 Tort Statute. One of them, of course, is the
22 extraterritorial application, which I don't think we need to
23 address here given that it has been very ably briefed in the
24 Supreme Court.

17:13 25 Their primary argument, Your Honor, is that

1 there simply is no way to hold Aramark or Academy liable
2 under the Alien Tort Statute. The case from the Fifth
3 Circuit that addresses it most clearly is the *Carmichael*
4 case. It's a 1988 case. And in that case the Fifth Circuit
17:13 5 held that for an Alien Tort Statute claim there has to be a
6 causal connection between the defendant and the wrongdoer.
7 The Plaintiffs simply haven't alleged any facts showing that
8 causal connection between either Aramark or Academy and the
9 actual wrongdoing.

17:13 10 In that case a British national sued Price
11 Waterhouse Coopers claiming that PWC was responsible when
12 the Saudi government locked him up.

13 Now, the facts of that case were interesting
14 in that what happened was he owed or his company PWC money
17:13 15 and he was locked up and he asked PWC to sign a release of
16 that debt and they refused to do so for a while and, so, he
17 was held for a while.

18 However, the Fifth Circuit was very clear in
19 dismissing the case -- or in affirming the dismissal that
17:13 20 the company, quote, "played no part in the incarceration"
21 and, in fact, didn't even know about it when it first
22 started, which is precisely what Plaintiffs' allegations are
23 here. They certainly don't allege that Academy or Aramark
24 knew about the incarceration when it began. They simply
17:13 25 allege that we may have known at some point right at the

1 very end.

2 So, we believe *Carmichael* is dispositive here,
3 given that they haven't alleged any causal connection and
4 the Alien Tort claim should be dismissed.

17:13 5 The other cases that we cite, the *Licea*, which
6 is a dry dock case -- it was a default judgment -- and the
7 *Bao Ge* case, which is a soccer ball case -- we believe those
8 both inform the Court about the kinds of allegations that
9 would survive a motion to dismiss and the kind that
17:13 10 wouldn't.

11 *Licea*, for example, is a forced labor scheme,
12 and in that case the participation of the company, the
13 company that was being held liable there, was far afield
14 from the minimal allegations here. In that case the company
17:13 15 had actually hosted members of the Cuban security apparatus.
16 The company had helped make sure the workers didn't escape
17 by keeping the workers on site in a secured area and by
18 hiring security personnel. That case is very different from
19 the minimal allegations here. There is simply is no way to
17:13 20 hold either Aramark or Academy liable for anything under the
21 Alien Tort Statute under that line of cases.

22 Now, the Plaintiff also relies on a theory, I
23 believe, of secondary liability. They don't go with aiding
24 and abetting. They are trying for conspiracy. The only one
17:13 25 they point to is agency. What gets confusing about agency,

1 Your Honor, is that you held in *Abecassis* -- is that the
2 right way to say it?

3 THE COURT: That's as close as I have ever come.

4 MS. KROPF: -- that *Abecassis* says that the
17:13 5 relevant standard under the Alien Tort Statute for secondary
6 liability is international law. So, all the parties spent a
7 lot of time briefing what we were comfortable with, which is
8 Texas law, and I believe Your Honor has held that that's not
9 going to be the right standard; it's going to be
17:13 10 international law.

11 We looked a little bit into what international
12 law would be for agency. It was not easy to find. But, for
13 example, in *Doe v. Nestle* the court there held that a
14 contract itself didn't equate to agency.

17:13 15 And, also, the International Law Commission,
16 which has issued some standards that seek to codify
17 customary international law -- there is a chapter in those
18 standards that is talking about -- It's the closest analogy
19 we could find. It's talking about what conduct would be
17:13 20 attributed to a state; and since, obviously, international
21 law is usually conduct of the state rather than private
22 corporations, this is the closest we could find.

23 I think that that information is very
24 instructive. It's in Chapter 2, Article 8, and it's
17:13 25 entitled "Conduct Directed or Controlled by the State". It

1 talks about how "the conduct shall be considered the conduct
2 of the state if that person" -- meaning the third party to
3 the state -- "is acting on the instructions of or under the
4 direction and control of the state in carrying out the
17:13 5 conduct. The state must have directed or controlled the
6 specific operation that's at issue." And there is not
7 agency under the International Law Commission standards if
8 the conduct was peripheral to the operation or escaped from
9 the state's direction and control.

17:13 10 So, in some ways it's not too far afield from
11 what Texas law would be. The primary issue, under at least
12 this version of international law -- which I will rely on
13 today because it was the best we could find -- is control,
14 and there simply are no allegations of control here.

17:13 15 I was struck by two things. I was struck when
16 Mr. Lapidus said he needed the contracts to determine how
17 much control there was, because in their opposition against
18 Aramark they made statements like "The factory operated
19 under," quote, "the control and strict orders from Aramark."
17:13 20 They don't have a citation for it.

21 THE COURT: I think that refers to the policies
22 that -- the compliance policies. Is that correct?

23 MR. LAPIDUS: It is, Judge.

24 THE COURT: All right. And nothing more, just so
17:13 25 we're clear. What's on the web site primarily and the

1 documents that you presented in your response?

2 MR. LAPIDUS: That's true, Judge.

3 THE COURT: All right.

4 MS. KROPF: Well, they also say that Aramark
17:13 5 imposed, quote, "strict price and time requirements on the
6 factory," and that also is not cited to anything, and there
7 is no allegation or anything, even to what they attach as
8 their opposition to support that.

9 They say that "Aramark", quote, "controls the
17:13 10 working conditions of the factory that would," quote, "set
11 the material terms and conditions of Plaintiffs'
12 employment."

13 THE COURT: Again, I think that's the reference to
14 the compliance policies, although the compliance policies
17:13 15 don't set caps on price or quantity, do they?

16 MR. LAPIDUS: I don't think so, Judge.

17 THE COURT: And what was the source of that?

18 MR. LAPIDUS: That part of the brief is the control
19 that -- at least, the allegation that's contained in the
17:13 20 complaint that should get us past the motion --

21 THE COURT: But did the complaint have a specific
22 allegation of the caps placed on numbers and price? And, if
23 so, what was the section, just so I have it handy?

24 MS. HENRY: Yes, Your Honor. Our reference point
17:13 25 for that and putting it into the allegations of the

1 opposition is from the UL-STR auditors standards and their
2 connection with the LESLi and how it's published on their
3 web site.

4 THE COURT: Is it in the complaint?

17:13 5 MS. HENRY: Yes, Your Honor.

6 THE COURT: Can you cite me -- Just so I have it
7 handy, if you could just cite me the section, that would be
8 useful.

9 MS. HENRY: Yes, Your Honor. On Pages 21 and 22 at
17:13 10 Exhibit -- No. Excuse me. At Page 14 of the complaint and
11 Exhibit C specifically names UL-STR as the auditor.

12 THE COURT: All right.

13 MS. KROPP: However, Your Honor, nothing in the
14 record and no allegations -- Even if you're looking at -- I
17:13 15 guess what they're looking at is our auditor standards --
16 set any price or time requirements for anything --
17 "anything" -- that shows control here. That is their
18 obligation, really, whether looking under Texas law or
19 international law.

17:13 20 THE COURT: Just for clarity, the auditor standard
21 sets the price and time limit? Is that what you're saying?

22 MS. HENRY: The auditor relies on the labor
23 standard time requirements which the auditor publishes on
24 their web site.

17:13 25 THE COURT: So, it's -- Let me get this straight.

1 So, Aramark or Academy hires the auditor. The auditor
2 publishes the criteria that it's going to use, and those
3 criteria, in turn, refer to a labor standard?

4 MS. HENRY: As to Aramark, yes. As to Academy, no.
17:13 5 Academy specifically publishes quantity, time, exact data,
6 and those are all attached to the opposition which are
7 referenced in the complaint.

8 THE COURT: Okay. At Page 14 where you cited?

9 MS. HENRY: As to Academy, Your Honor, it is
17:13 10 Pages 15 and 16.

11 THE COURT: Thank you. That's helpful.

12 All right. Go ahead.

13 MS. KROFF: Your Honor, I think even if you take
14 everything the Plaintiffs have said as true and when you
17:13 15 actually look and actually read the exhibits they simply
16 doesn't support the contention that there was control here.
17 Under Texas law there has to be control over the day-to-day
18 operations, and there is nothing here that alleges that at
19 all against either Academy or Aramark.

17:13 20 Your Honor, the remainder of my argument goes
21 to the specifics of the claims under the Alien Tort
22 Statute -- prolonged detention, trafficking and slavery. I
23 am happy to stand on my papers on those, unless you'd like
24 to hear argument.

17:13 25 THE COURT: I think your papers do a good job of

1 addressing those. These are the broad issues.

2 MS. KROPF: Thank you, Your Honor. I have no
3 further comment, unless you have questions.

4 THE COURT: No. I think this is helpful.

17:13 5 Is the best way to proceed now to hear
6 Academy's version of these and then hear from the
7 Plaintiffs?

8 MR. DOVE: We don't have anything to add to that,
9 Your Honor.

17:13 10 THE COURT: All right. Did you want to respond to
11 the description of your -- I guess, the reference that they
12 make to your standards for price caps and numbers?

13 MR. DOVE: It's my understanding that the argument
14 they were making with regard to price caps really relates to
17:13 15 Aramark. I didn't see it as a response to us.

16 The way that they framed it with regard to us
17 was purely, 'Well, look at the things that you specify in
18 the goods. You want them delivered in a certain way and you
19 want the tag put in a certain place. So, therefore, you
17:13 20 must have day-to-day control over the lives of these
21 workers,' which I don't think makes any sense at all.

22 Certainly, there is nothing in our auditing
23 standards that has anything about that. There is no way to
24 take anything that they attached to their response to our
17:13 25 motion to read that we somehow force our vendors into forced

1 labor by setting prices so low. There's no evidence of
2 that. There's not even an allegation of that.

3 And I don't think there is any more to add.

4 THE COURT: All right. Thank you.

17:13 5 Go ahead, please.

6 MS. PANJWANI: I will also be brief.

7 THE COURT: I think we need the microphone.

8 MS. PANJWANI: Okay. Good afternoon, Your Honor.

9 THE COURT: Good afternoon.

17:13 10 MS. PANJWANI: I will also be brief. We also rest
11 on our papers with respect to extraterritoriality, corporate
12 liability, bloc nations.

13 What I would just like to clarify: I know our
14 complaints could have been more artfully crafted, but the
17:13 15 core claim is actually one of labor trafficking or forced
16 labor, however you want to characterize it. The false
17 imprisonment, the batteries, those are indications, those
18 are hallmarks, of forced labor. It's why the forced labor
19 and labor trafficking is a universally condemned
17:13 20 international norm. I think many courts have recognized it,
21 including here in the Fifth Circuit. And, so, I do want to
22 provide that clarification.

23 THE COURT: All right.

24 MS. PANJWANI: I won't list every international
17:13 25 treaty in our State Department, but it's all in the papers.

1 So, that's that clarification.

2 And with respect to how do we enforce
3 violations of these international norms, the international
4 norm defines the prospective conduct and it's historically
17:13 5 been our domestic laws that defines how we go about
6 enforcing it, and that is why we believe our "joint
7 employer" theory is relevant here.

8 THE COURT: Wait. I'm not linking those dots.
9 Perhaps you could help me.

17:13 10 MS. PANJWANI: Counsel indicated that we have to
11 show causation under international standards and that the
12 international standard, you know, is -- there is some
13 analogy to local law, but, historically, the enforcement has
14 been under domestic law. I have standing authority to the
17:13 15 contrary. I wanted to point that out.

16 THE COURT: All right.

17 MS. PANJWANI: I will defer to my colleagues in
18 terms of the factual indications of control.

19 Thank you.

17:13 20 THE COURT: All right. Thank you.

21 Anything additional that any party wants to
22 add?

23 MS. KROPF: No, Your Honor.

24 MR. DOVE: No, Your Honor.

17:13 25 MR. BURCK: Your Honor, if I may just be brief for

1 one minute.

2 THE COURT: Sure.

3 MR. BURCK: You have obviously heard a lot of
4 discussion, mostly from that table over there, about what
17:13 5 kind of proof we have and what kind of evidence we have.
6 We're not at that stage of the litigation. We're at the
7 stage of the litigation where all we're required to do is to
8 allege facts that can create a plausible cause of action.

9 We have a 42-page complaint. It's not to be
17:13 10 looked at piecemeal. It's not to be looked at one paragraph
11 at a time. It's to be looked at in its entirety and as a
12 whole. The documents that we have provided in our response
13 are specifically addressed in the complaint, maybe not by
14 name, but by the exact name they're referenced. They're in
17:13 15 a footnote. They're somewhere in the complaint.

16 THE COURT: Is it appropriate for me to look at
17 them in assessing a 12(b)(6) argument --

18 MR. BURCK: Yes, ma'am.

19 THE COURT: -- if they haven't been specifically --
17:13 20 There is a narrow category of documents that can be
21 considered under 12(b)(6) if there are matters outside the
22 pleadings.

23 MR. BURCK: And my understanding of that, Judge, is
24 if they are specifically referenced in the pleading --

17:13 25 THE COURT: And usually attached to the -- either

1 attached to the complaint or to the defendant's motion to
2 dismiss, not often attached to the plaintiff's opposition to
3 the defendant's motion to dismiss. This is a little bit
4 different.

17:13 5 MR. BURCK: I understand. But that's why we
6 referenced them in the complaint. We didn't add them just
7 because, literally, as you have seen, then our complaint
8 would be four notebooks thick because that's what our
9 response, with the documents, ended up being and that's why
17:13 10 we specifically referenced them, which gave them an
11 opportunity to go find them.

12 So, I think what this court is allowed to do
13 is to take notice of those documents that are attached to
14 the response because they are specifically cited in the
17:13 15 complaint and are central to the causes of action that we
16 allege.

17 Thank you, Your Honor.

18 THE COURT: Thank you.

19 Yes, ma'am.

17:13 20 MS. BANG: I just wanted to clarify one issue that
21 I saw some discussion with regard to the price ceiling and
22 being the different exhibit. What we were referring to is
23 that Academy's Smart Guide. It's the monetary penalties for
24 certain violations, not proceeding a certain way, and that
17:13 25 is not the only indicia of control that we are alleging. We

1 are combining that with the economic reality test. And when
2 you look at the other factors showing dependency of the
3 workers, theirs unskilled nature, the fact that the contract
4 was unilaterally negotiated, we assume that the discovery
17:13 5 will show that, in that respect, there is control asserted
6 by both Academy and Aramark.

7 I would just add as one final issue, Your
8 Honor -- and I know that the defense has strenuously asked
9 you not to allow us to amend, but I would submit the
17:13 10 following reasons for the Court to indulge us in this
11 request.

12 First, it is contrary to the spirit of the
13 Federal Rules of Civil Procedure --

14 THE COURT: Not after three times.

17:13 15 MS. BANG: -- mere technicalities --

16 THE COURT: Okay. Mere technicalities, yes, of
17 course.

18 MS. BANG: And I know you think it's three times.
19 It really is substantively only once with respect to Academy
17:13 20 and Aramark, and it was with consent, and this time we would
21 be asking for leave of court to do so. There is no --

22 THE COURT: It's a fair point.

23 MS. BANG: I'm sorry?

24 THE COURT: It's a fair point.

17:13 25 MS. BANG: Also, there is no due process issue for

1 the Defendants. The terms were raised in our complaint. We
2 also gave them notice in our opposition. There is no
3 prejudice to the Defendants. They could have further
4 opportunity to proceed and address these issues if they'd
17:13 5 like to. And we have to amend the complaint, anyway, to
6 remove RICO. So, if you could indulge us in that.

7 And we have one final point to be addressed by
8 Mr. Quan.

9 THE COURT: All right. Thank you.

17:13 10 MR. QUAN: Good afternoon, Your Honor. Gordon
11 Quan.

12 In Defendant's response there was an
13 allegation made of a possible conflict of interest. I am
14 here today as a member of Lawyers Against Human Trafficking,
17:13 15 not in my capacity with Foster Quan. I wanted to clarify
16 that to the Court, Your Honor; that our firm no longer
17 represents Academy but for two old cases that were
18 previously handled by Tindall & Foster before our merger.
19 They allege that, if I had known of this conduct, I condoned
17:13 20 that conduct. Obviously, Your Honor, had I known --

21 THE COURT: By "that conduct" you mean a conflict?

22 MR. QUAN: The trafficking, Your Honor.

23 THE COURT: Okay. All right.

24 MR. QUAN: So, I just wanted to go on record, Your
17:13 25 Honor, that I am not here on Foster Quan's behalf but as a

1 member of Lawyers Against Human Trafficking.

2 Thank you, Your Honor.

3 THE COURT: All right. Thank you.

4 MS. KROPF: Your Honor, may I be heard briefly on
17:13 5 one issue?

6 THE COURT: Sure.

7 MS. KROPF: Your Honor, on the amendment point,
8 they did amend substantively once, I agree, but they amended
9 after they saw every one of our arguments in our motion to
17:13 10 dismiss. They had every opportunity to fix it, every
11 opportunity to add all of the exhibits they now attached to
12 their reply, and they haven't offered you any reason by
13 which, if they're allowed to amend, they have new facts or
14 new allegations to include.

17:13 15 THE COURT: Other than the ones they have rehearsed
16 in their opposition.

17 MS. KROPF: Yes. But they haven't offered anything
18 factual that would really change the view here. And our
19 view is, Your Honor, that even if you took everything in
17:13 20 those exhibits and put them into the complaint -- which they
21 are not there, nor are they specifically referenced -- you
22 would come to the same conclusion; it should be dismissed.

23 THE COURT: Then, isn't the more efficient way for
24 me to proceed to consider all of those, because I would have
17:13 25 to do so in deciding whether it would be futile for them to

1 replead?

2 MS. KROPF: As far as Aramark goes, that would be
3 our preference. I don't want to speak for the other
4 parties.

17:13 5 THE COURT: All right.

6 MR. DOVE: We proposed that course of action in our
7 reply.

8 THE COURT: You did.

9 MR. PECHT: Your Honor, with regard to Well and
17:13 10 David --

11 THE COURT: You're a little bit of a different
12 position because you have got a 12(b)(2). I know that.

13 MS. KROPF: Thank you, Your Honor.

14 THE COURT: All right. Anything else?

17:13 15 I do have one final question. How many people
16 watching are summer associates? You saw some very good
17 advocates. You were very fortunate to hear some of the
18 issues in the way in which they were presented.

19 I hope you're having a good summer.

17:13 20 Thank you very much.

21 COURT REPORTER'S CERTIFICATE

22 I, BRUCE SLAVIN, certify that the foregoing is a
23 correct transcript from the record of proceedings in the
above-entitled matter, to the best of my ability.

24 s/Bruce Slavin
25 BRUCE SLAVIN, RPR, CM

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